United States Court of Appeals

for the Second Circuit

APPENDIX

75-7698

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC. and HERBERT FREY and LOIS MUCK, as co-executors of the Estate of GEORGE C. FREY, Deceased,

Plaintiffs-Appellants,

VS.

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the Controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants-Appellees.

P/S

APPEAL FROM THE FINAL DECISION, ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK AT CIVIL ACTION NO. 1970-277.

UNITED STATES COURT OF APPEALS
FILED
SEP 13 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

VOLUME I—Pages 1-704

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3

PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE C. FREY READY-MIXED CONCRETE, INC., et al.,

Plaintiffs-Appellants,

vs.

PINE HILL CONCRETE MIX CORP., et al.,

Defendants-Appellees.

Docket No. 75-7698

CORRECTIONS TO BRIEF FOR PLAINTIFFS-APPELLANTS.

Page	Paragraph	Line	Correction
8	fn. 7	7	Should read: Re ent, Quadco, ..."
9	Last	second from bottom	Change last word to "purchases"
15	First	4	Delete "that"
17	Last	last	Change"1500 per day" to "$500 per day"
18	3	1	Delete quotation marks
18	5	2	Change "Disco" to "Bisco"
19	1	7	Should read: "Buffalo Perlite Co.-1957 (Kahle-light-weight aggregate)"
19	1	10	Should read: "Buffalo Perlite Co.-1970 (Pine Hill-Light-weight aggregate)
20	Last	2	Change "affect" to "effect"
22	Top	4	Change "stores" to "stored"
26	Bottom	3	Insert Beginning parenthesis
27	Top	1	Insert Closing parenthesis mark after "supra" Delete words "Such acquisitions"
27	Heading	5	Should read: "Sherman Act §§ 1 & 2"
32	fn. 40	2	Change "then" to "then"
41	2 & 3	-	Transpose Second and Third paragraphs.

INDEX.

	Vol.	page
Docket Entries	I	1
Complaint	I	7
Answer	I	23
Defendants' Motion for Discovery and Inspection	I	28
Defendants' Notice of Deposition	I	37
Order Granting Defendants' Motion for Discovery and Inspection, September 15, 1970	I	39
Plaintiffs' First Interrogatories to Defendants	I	43
Plaintiffs' Notice of Depositions	I	68
Defendants' Objections to Plaintiffs' Interrogatories.	I	71
Plaintiffs' Motion to Compel Discovery	I	77
Plaintiffs' Second Interrogatories to Defendants	I	80
Plaintiffs' Motion to Compel Discovery	I	91
Plaintiffs' Motion to Compel Answers to Interrogatories	I	94
Order of May 7, 1971	I	95
Affidavit and Order to Show Cause for an Order Vacating or Modifying Order of May 7, 1971	I	99
Plaintiffs' Cross-Motion to Hold Defendants in Contempt	I	107
Supporting Affidavit of Herbert G. Frey	I	109
Supporting Affidavit of Arnold Weiss	I	119
Defendants' Supplemental Supporting Affidavit of Norman M. Moran	I	123
Defendants' Supplemental Supporting Affidavit of Charles J. McDonough	I	137
Plaintiffs' Motion for Separate Trials	I	161
Supporting Affidavit of Herbert G. Frey	I	165
Order of June 9, 1971	I	178
Defendant Pine Hill's Answers to Interrogatories	I	182
Answer of Defendant Regent Sand & Gravel Corp. to Plaintiffs' Interrogatories	I	188
Answer of Defendant Ludwig F. Kahle to Plaintiffs' Interrogatories	I	192

	Vol.	page
Answer of Defendant Joseph Pfohl to Plaintiffs' Interrogatories	I	195
Answer of Defendant Fidelis H. Pfohl to Plaintiffs' Interrogatories	I	199
Answering Affidavit of Charles J. McDonough	I	203
Plaintiffs' Note of Issue--March 1972 Term	I	209
Plaintiffs' Notice of Depositions	I	211
Plaintiffs' Motion to Compel Discovery	I	212
Answering Affidavit of Victor E. Manz	I	213
Order of May 31, 1973	I	223
Plaintiffs' Motion to Compel Discovery	I	225
Opposing Affidavit of Charles J. McDonough	I	227
Affidavit of Victor E. Manz	I	229
Plaintiffs' Subpoena to Defendants	I	230
Plaintiffs' Motion to Quash Defendants' Subpoena	I	234
Order of July 6, 1973	I	236
Defendants' Motion for An Order Amending Order Dated June 9, 1971	I	237
Plaintiffs' Cross-Motion to Compel Discovery	I	249
Supporting Affidavit of A. Douglas Burg	I	250
Supporting Affidavit of Lois Muck	I	256
Supporting Affidavit of Arnold Weiss	I	271
Affidavit of Norman M. Moran	I	275
Affidavit of Robert E. Jones	I	279
Affidavit of Melvin E. Becker	I	282
Affidavit of Victor E. Manz	I	284
Order of October 16, 1974	I	286
Plaintiffs' Notice of Depositions	I	287
Magistrate's Order of October 22, 1974	I	288
Plaintiffs' Motion to Change Parties	I	289
Plaintiffs' Notice of Argument of Appeal and Motion to Change Parties	I	291
Opposing Affidavit of Herbert G. Frey	I	293
Plaintiffs' Statement in Support of Proposed Modifications	I	317

	Vol.	page
Plaintiffs' Response to Defendants' Suggested Amendments to the Order of June 9, 1971.....	I	326
Affidavit of Metro Kushman.....	I	340
Plaintiffs' Objections to Defendants' November 5, 1974 Retraction of Price Offer of October 28, 1974.	I	341
Affidavit of Lois Muck.....	I	346
Order of November 20, 1974.....	I	352
Notice of Appeal.....	I	356
Reply Affidavit of Lois Muck.....	I	359
Affidavit of Norman M. Moran.....	I	368
Plaintiffs' Notice of Production and Discovery.....	I	370
Affidavit of Norman M. Moran.....	I	379
Affidavit of Victor T. Fuzak.....	I	387
Affidavit of Arnold Weiss.....	I	397
Affidavit of Elwin G. Day.....	I	406
Defendants' Motion to Dismiss Complaint and for Summary Judgment.....	I	407
Affidavit of Norman M. Moran.....	I	409
Affidavit of Victor T. Fuzak.....	I	439
Letter Dated January 14, 1975 from Victor T. Fuzak....	I	477
Defendants' Motion to Stay Discovery.....	I	479
Supporting Affidavit of Victor T. Fuzak.....	I	480
Plaintiffs' Motion to Serve Amended Complaint.....	I	488
Supporting Affidavit of Herbert G. Frey.....	I	490
Supporting Affidavit of Lois Muck.....	I	499
Defendants' Affidavit of Victor T. Fuzak.....	I	523
Affidavit of Norman M. Moran.....	I	533
Plaintiffs' Motion to Compel Production.....	I	547
Supporting Affidavit of James J. Neill, Jr.....	I	548
Affidavit of Victor T. Fuzak Dated July 14, 1975.....	I	555
Opposing Affidavit of Lois Muck.....	I	560
Order of August 4, 1975.....	I	573
Letter Dated August 8, 1975 to Judge Curtin from Defendants' Attorneys.....	I	577

	Vol.	page
Plaintiffs' Cross-Motion to Complete Discovery, Serve an Amended Complaint, and Defer Defendants' Motion to Dismiss	I	580
Supplemental Opposing Affidavit of Lois Muck	I	581
Supplemental Opposing Affidavit of James J. Neill, Jr.	I	592
Letter Dated August 18, 1975 to Judge Curtin from Defendants' Attorneys	I	600
Decision of November 10, 1975	I	603
Judgment Dismissing Complaint	I	614
Notice of Appeal	I	615
Deposition of Herbert Frey, March 5, 1973	I	617
Deposition of Herbert Frey, March 6, 1973	II	705
Deposition of Herbert Frey, March 13, 1973	II	744
Deposition of Herbert Frey and Lois Muck, July 10, 1973	II	759
Deposition of Herbert Frey and Lois Muck, July 16, 1973	II	771
Deposition of Herbert Frey and Lois Muck, November 8, 1973	II	780
Proceedings Before Magistrate, November 9, 1974	II	787
Proceedings Before Magistrate, November 21, 1974	II	882
Proceedings Before Magistrate, November 25, 1974	II	925
Transcript of Proceedings Before Court, October 16, 1974	II	1074
Motion	II	1075
Transcript of Further Proceedings Before Court, January 20, 1975	II	1268
Transcript of Proceedings Before Court, May 12, 1975	II	1285
Plaintiffs' Letter to Court Dated July 31, 1975	II	1330
Defendants' Motion for a Protective Order Dated September 2, 1974	II	1332
Affidavit of R. William Stephens Dated January 13, 1975	II	1335
Plaintiffs' Proposed Alternative Amendments to May 7, 1971 Order	II	1343
Letter Dated March 11, 1975 to Judge Curtin From Defendants' Attorneys	II	1362

	Vol.	page
Letter Dated April 9, 1975 to Judge Curtin From Defendants' Attorneys	II	1363
Letter Dated April 21, 1975 to Judge Curtin From Defendants' Attorneys	II	1364
TESTIMONY.		
Witnesses for Plaintiffs:		
Muck, Lois		
Direct Examination	II	1104
Cross Examination	II	1174
Re-direct Examination	II	1189
Re-cross Examination	II	1196
Moran, Norman M.		
Direct Examination	II	1198
EXHIBITS.		
Defendants' Exhibits:		
Exhibit AD1--Document. Marked for identification at	II	953
Printed at	II	1365
Exhibit AD2--Document. Marked for identification at	II	953
Printed at	II	1366
Exhibit AD3--Document. Marked for identification at	II	955
Printed at	II	1367
Exhibit AD4--Document. Marked for identification at	II	955
Printed at	II	1368
Exhibit AD5--Document. Marked for identification at	II	955
Printed at	II	1369
Exhibit AD6--Document. Marked for identification at	II	955
Printed at	II	1370
Exhibit AD7--Document. Printed at	II	1371
Exhibit AD8--Document. Printed at	II	1372

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Docket Entries.

Jury demand date: 6/17/70

Form No. 106 Rev.

Civ.-1970-277

TITLE OF CASE	ATTORNEYS
RGE C. FREY READY-MIXED CONCRETE, INC.; RGE C. FREY BATCHING PLANT, INC.; and BERT FREY and LOIS MUCK, as Co-Executors the ESTATE OF GEORGE C. FREY, Deceased vs. E HILL CONCRETE MIX CORP.; REGENT SAND & AVEL CORP.; LUDWIG F. KAHLE, JOSEPH PFOHL; L M. PFOHL; and FIDELIS H. PFOHL, indivi-lly and as the controlling and surviving ectors, Officers, Shareholders, Liquidators Receivers of the Assets of PFOHL BROTHERS, ., a dissolved corporation, and PFOHL THERS, INC.	For plaintiff: Raichle, Banning, Weiss & Halperm - 10 Lafayette Square Buffalo, NY-14203 For defendant: ~~Charles J. McDonough McDonough, Boasberg, McDonough & Beltz 930 Walbridge Bldg. Buffalo, New York 14202~~ Victor E. Manz, Esq. Manz & Manz 425 Statler Hilton Buffalo, New York 14202 Victor T. Fuzak, Esq. Hodgson, Russ, Andrews, Woods & Goodyear 1800 One M & T Plaza Buffalo, N.Y. 14203

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
. 5 mailed	Clerk		6-17-70 JUN 19 1970	# 97879 Clerk's Office of the U. S.	15.00	
. 6 mailed	Marshal					15.00
sis of Action: Sherman Anti-Trust & Clayton Acts	Docket fee					
	Witness fees					
tion arose at:	Depositions					

Docket Entries.

Civ.-1970-277 George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill, et al.

DATE	PROCEEDINGS	Date Order or Judgment No
1970		
June 17	Filed complaint & Demand for Jury Trial	
" "	Issued summons, dup. orig. & 7 copies	
" "	JS 5 made	
July 28	Filed defts' Answer	
28	" defts' Affidavit and Notice of Motion for Discovery and Inspection-ret. 8/17/70, adj. 8/24/70-granted 9/4/70	
28	" defts' Notice of Deposition	
Aug. 17	" summons-served 7/9/70 Pine Hill Concrete Mix Corp., Regent Sand and Gravel Corp. and Pfohl Brothers Inc. and Ludwig Kahle	
17	" Mar. ret. on S&C-served 7/14/70 Rosemarie Phillips, Secretary, Pfohl Brothers	
Sept. 15	" Order for Discovery and Inspection-Curtin, J. (notice & copy to Raichle, Banning, etc.)	F-108
Dec. 3	" Pltfs'. Instructions for Interrogatories to Defendants	
10	" Pltfs'. First Interrogatories to Defts.	
16	" Pltfs'. Notice of Taking Depositions	
1971		
Jan. 7	" Defts.' Objections to Interrogatories	
Feb. 17	" Pltfs'. Motion for order compelling discovery-ret. 2/26/71; 3/5/71 Deft. will attempt to answer interrogatories by 4/12/71; Defts. depositions to be held 4/19/71. Pltf's. depositions to be held May 17, 1971. Motion for order compelling discovery is adjourned generally.	
Apr. 1	" Defts'. Objections to Pltfs'. Second Interrogatories	
19	" Pltfs'. Motion for order striking pleadings & granting judgment-ret. 4/30/71; adj. 5/7/71-Order re selling & supply. Pltfs.	
28	" Pltfs'. Notice of Motion to compel answers to interrogatories-ret. 4/30/71; adj. 5/7/71-Order re selling & supply. Pltfs.	
May 7	" Order restoring the status quo which existed prior to the institution of this litigation re selling & supplying Pltfs'. concrete grit & gravel, etc.-Curtin, J (notice & copy to Mr. McDonough)	F-116
11	" Affidavit & Order to Show Cause for an order vacating or modifying order of 5/7/71-Curtin, J ret. 5/14/71	F-116
13	" Court Reporter's Transcript of Proceedings of 3/5/71 and 5/7/71	
14	Motion by Deft., on return of order to show cause why order of court should not be entered vacating or modifying order of 5/7/71 - court directs parties to meet & discuss possible revision of present order. Order of 5/7/71 stayed until 5/19/71. Attys. are directed to return 5/19/71.	
*	The following papers were found in file when ret. by Judge:	
*June 9	Filed Pltfs'., Second Interrogatories to Defts.	
*June 9	" Pltfs'., Answering Affidavits & Cross-Motion	
*June 9	" Defts'., Supplemental Supporting Affidavit of Norman M. Moran	
*June 9	" Defts'., Supplemental Supporting Affidavit of Charles J. McDonough	
June 9	" Pltfs'., Affidavit & Motion for separate trials-ret. 6/18/71; 6/25/71	
9	" Order amending order of 5/7/71 in certain respects; directing additional charge on materials to Pltfs'., and setting certain dates for pretrial proceedings-Curtin, J (notice & copy to Messrs. McDonough and Raichle, Banning, etc.)	F-117
July 9	" Answer of Deft. Pine Hill Concrete Mix Corp. to Pltfs'. Interrogatories	

Docket Entries. (2)

Civ-1970-277 George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill, et al.

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order Judgment N
1971		
July 9	Filed Answer of Deft. Regent Sand & Gravel Corp. to Pltfs'. Interrogatories	
9	" Answer of Deft. Ludwig F. Kahle to Pltfs'. Interrogatories	
9	" Answer of Deft. Joseph Pfohl to Pltfs'. Interrogatories	
9	" Answer of Deft. Fidelis H. Pfohl to Pltfs'. Interrogatories	
16	" Defts' Answering Affidavit	
16	Motion by Pltfs'.,for separate trials - decision reserved	
1972		
Feb. 24	Filed Pltfs'. Note of Issue - March 1972 Term	
Apr. 24	Pretrial Conference (US Magistrate)	
July 25	Pretrial Conference (US Magistrate)	
Aug. 21	Pretrial Conference (US Magistrate)	
28	Pretrial Conference (US Magistrate)	
Dec. 15	Pretrial Conference (U.S. MAGISTRATE)	
1973		
[illegible]	[illegible]	
Feb 15	Filed Pltfs' Notice of taking depositions on 2/19/73	
May 18	" Pltf's. Notice & Motion for order granting them leave to proceed w/discovery & deferring further discovery by defts. until completion of pltfs' discovery ret 5/24/73 ; 5/29/73	
29	Pretrial Conf. Held. Curtin	
31	Filed Defts. Answering Affidavit	
31	" Order that pltfs's. motion for order deferring further discovery of defts & granting leave to pltfs to proceed to discovery denied; each side to immediately serve the other w/ a subpoena duces tecum setting forth material needed to proceed w/taking of depositions; during wk. of 6/4/73 defts. shall resume deposing pltfs. representatives & any motions to quash or modify subpoenas shall be made promptlyand that pltf's motion to move against defts objections to pltf's interrogatories to be made promptly. Curtin DJ Notice & copies Raichle, etc. & Manz etc.	F-140
June 4	Filed Pltfs'. Motion to compel discovery ret. 6/7/73; 6/28/73; 7/5/73	
27	" Defts'. Affidavit of Charles J. McDonough	
27	" Defts'. Affidavit of Victor E. Manz	
July 3	" Pltfs. Motion to Quash Subpoena and/or for a protective order-ret. 7/5/73	
3	" Pltfs'. Civil Subpoena D.T.---Messrs. Manz and McDonough served 7/3/73	
July 5	Motion by pltf. to compel deft. to ans. interrogatories. Motion denied w/leave to renew giving more details. Motion by pltf. to quash subpoena. Motion denied. Court directs that materials set forth in deft's. subpoena be delivered to the deft. and that depositions, scheduled for 7/9/73 shall go forward	
July 6	" Order that pltfs', motion to compel discovery is denied w/ leave given to pltfs. to refile & pltfs. motion to quash subpoena of defts, denied. The deposition set for 7/9/73 shall promptly proceed, Curtin DJ Notice & copies Messrs. Weiss, Manz & McDonough	F-142
1974		
June 25	Filed Deft., Pine Hill Concrete, motion for an order amending Ct. order dated 6-9-71 etc. ret. 7-1-74; adj. 7/8/74; adj. 7/22/74	
July 18	Filed pltfs. affidavits in opposition to defts. motion to amend Ct. order dated 6-9-71 and cross motion for defts. to appear & be deposed ret.7-22-74 adj. 7-29-74adj. 9-9-74 adj. 9-16-74 adj. 9-30-74	
Sept. 6	Filed affidavit of Norman M. Moran of Pine Hill Concrete Mix.	
Oct. 7	Motion by deft. to amend previous order of the court. adj. to 10-16-74 at 2:00	

Docket Entries.

Civ-I970-277

DATE 1974	PROCEEDINGS	Date Orde Judgment
Oct. 16	Filed order referring supervision of discovery & depositions to Magistrate Maxwelletc.-Curtin, DJ N tice & copies to Arnold Weiss, Victor Manz & Victor Fuzak	F-1
17	Filed Pltfs.Notice to take depositions of defts. on 10-18-74.	
16	The Ct. directed counsel to submit memorandum by 10-29-74.	
25	Filed order that defts. examination of pltfs. but in no event later than 12-6-74 pltfs. are to be granted access to appropriate books of defts., case shall be ready for trial by 3-1-75 etc.-Maxwell, U.S. Magistrate Notice & copies to Arnold Weiss, Victor Manz & Victor Fuzak	F-15
25	Filed Pltfs. motion to change parties .	
25	" Pltfs. notice of argument of appeal & motion to change parties ret. 10-29-74	
29	Filed Pltfs. affidavit by Herbert G. Frey.	
29	" Pltfs. proposed modifications to order of 6-9-71.	
29	Motion by pltf. to add additional party. Ruling deferred by Ct.	
	Appeal by pltf. from order of the Magistrate. Submitted.	
Nov. 5	Filed Pltfs. response to defts' suggested amendments to the order of 6-9-71	
5	Filed affidavit of Metro Kushman for pltf.	
19	Filed Pltfs. objections to defts' 11-5-74 retraction of price offer of 10-28-74	
19	Filed affidavit of Lois Muck by Pltf.	
20	Filed order denying pltfs. motion. The Court adheres to its prior order referring questions of discovery & depositions to the Magistrate, etc.-Curtin, DJ Notice & copies to Arnold Weiss, Victor Fuzak & Victor E. Manz	F-158
20	Filed notice of appeal by pltf. to Judge Curtin re the order granted by Magistrate Maxwell on 10-22-74	
20	Filed pltfs. reply affidavit by Lois Muck in answer to reply affidavits of Norman Moran etc	
20	Filed defts. affidavit of Norman M. Moran	
29	" Pltfs'. Notice of Production and Discovery	
Dec. 18	Filed deft. affidavit by Norman Moran in support of objections by defts. to pltfs. notice of production etc.	
18	Filed affidavit of Victor Fuzak re the notice of production.	
30	**Oral argument. Adj. to 2-3-75**	
19	Filed Defts'. Memorandum on objections to notice to produce	
27	~~Pltfs'. Affidavits in opposition~~	
1975 Jan. 6	Filed EBT of Herbert Frey taken 3-5-73	
6	" EBT of Herbert Frey taken 3-6-73	
6	" EBT of Herbert Frey taken 3-13-73	
6	" EBT of Herbert Frey & Lois Muck taken 7-10-73	
6	" EBT of Herbert Frey & Lois Muck taken 7-16-73	
6	" EBT of Herbert Frey & Lois Muck taken 7-18-73	
6	" EBT of Herbert Frey & Lois Muck taken 11-8-73	
6	" transcript of proceedings before Mag. Maxwell on 11-9-74	
6	" transcript of proceedings before Mag. Maxwell on 11-21-74	
6	" transcript of proceedings before Mag. Maxwell on 11-25-74	
* 6	" transcript of proceedings before Mag. Maxwell on 11-25-74	
13	Filed defts. notice of motion for dismissing the complaint & awarding attys. fees to defts. & for summary judgment ret. 1-20-75	
13	Filed defts. affidavit on motion for dismissal	
13	" defts. affidavit in support of motion for dismissal.	
17	Filed letter dated 1-14-75 from Victor Fuzak re "Affidavit in Opposition and for Deferral"	
* 9	" Pltfs'. Report to the Court, etc.	
10	" Defts'. Affidavit on motion for protective order	

Docket Entries.

George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill, et al.

D. C. 110 Rev. Civil Docket Continuation

DATE 1975	PROCEEDINGS	Date Order or Judgment Note
Jan. 20	Motion by deft. to dismiss complaint. Pltf. to file affidavits in opposition to motion by 2-24-75. Both sides to file memos by 3-10-75. Oral argument 3-17-75 at 2:00pm	
24	Filed Defts. notice of motion for stay of discovery proceedings ret. 1-29-75 before the Magistrate.	
24	" Transcript of proceedings on 1-29-75 before Magistrate	
eb. 24	Pltfs. affidavit due adj. to 3-10-75	
ar. 10	Filed Pltfs. motion for leave to serve an amended and supplemental complaint ret. 3-17-75	
10	Filed affidavit of Herbert G. Frey in opposition to motion to dismiss and in support of motion to serve amended & supplemental complaint.	
10	Memorandums due. No appearances.	
17	Oral argument on motions. Adj. to 4-7-75 at 2:00pm adj.to 4-21-75 for exchange of briefs. & to 4-28-75 at 2:00pm for oral argument.	
pr. 21	Return date for briefs. Adj. to 5-5-75	
28	Oral arguments on motions. Adj. to 5-12-75	
May 5	Filed Defts. affidavit in response to the 3-7-75 affidavits of Herbert G. Frey & Lois Muck on behalf of pltfs.	
5	Filed Norman M. Moran affidavit of behalf of defts.	
5	Filed defts'. memorandum of law in support of motion to dismiss.	
6	Filed Pltfs. brief in opposition to defts'. motion to dismiss.	
ay 9	Filed Pltfs. motion for an order compelling defts. to allow pltfs. to discover inspect & copy defts. books, etc. involved in this action	
12	Motions by deft. for dismissal of complaint & for summary judgment. Submitted	
ily 15	Filed Defts'. affidavit of Victor T. Fuzak	
ug. 4	Filed affidavit of Lois Muck in opposition to defts. motion to dismiss	
4	" order giving pltf. time to file a brief to 8-18-75 & the deft. is to file a statement describing in detail the papers on which reliance is placed in urging the motion for summary judgment etc. by 8-18-75-Curtin, DJ Notice & copies to Arnold Weiss & Victor Fuzak & Manz, Manz & Diviak	F-167
11	Filed letter to JudgeCurtin dated 8-8-75 from Victor Fuzak re the dismissal of the complaint.	
19	Filed pltfs. cross motion for leave to complete their discovery etc.	
19	" supplemental affidavit of Lois Muck in opposition to motion to dismiss	
19	" Pltfs. further brief in opposition to defts'. motion to dismiss	
18	Last day for filing papers re summary judgment. No appearances.	
19	Filed defts. memorandum in letter form	
Aug. 5	Oral argument on pltfs. motion for production of documents. Ct. directed that pltf. be allowed to examine defts. records of sales & purcheses from 1958 through 8-31-75. On all other aspects of the case decision is reserved pending decision by Judge Curtin on motion to dismiss.	
ov. 10	Filed decision & order that the Ct. has no jurisdiction over claims 2 through 6, because there is no diversity of citizenship. Defts' motion to dismiss the cause of action for failure to state a claim pursuant to Rule 12 & for summary judgment pursuant to Rule 56 are granted etc.-Curtin, DJ Notice & copies to Arnold Weiss, Victor Fuzak & Victor Manz	F-170
10	Filed judgment that the Ct. has no jurisdiction over claims 2-6 etc. and defts'. motion to dismiss the cause of action for failure to state a claim pursuant to Rule 12 & for summary judgment pursuant to Rule 56 are granted-Clerk Notice & copies to Arnold Weiss, Victor Fuzak & Victor Manz	F-170
10	JS 6 made	

(over)

CLOSED

Docket Entries.

DATE 1975	PROCEEDINGS	Date Order o Judgment Not
Dec. 8	Filed Pltfs'. Notice of Appeal (copy mailed to Messrs. Fuzak and Manz and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Weiss)	

Complaint.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.;
GEORGE C. FREY BATCHING PLANT, INC.; and
HERBERT FREY and LOIS MUCK as Co-Executors
of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

Civil Action
No. 1970 -277

PINE HILL CONCRETE MIX CORP.;
REGENT SAND & GRAVEL, CORP.;
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL, and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
liquidators and receivers of the
assets of PFOHL BROTHERS, INC., a
dissolved corporation; and
PFOHL BROTHERS, INC.,

Defendants.

COMPLAINT

FIRST CLAIM

JURISDICTION

1. This Claim arises under the Act of July 2, 1890, c. 647, §1 et seq., 26 Stat. 209, 15USCA 1 et seq., commonly known as the Sherman Anti-Trust Act; and the Act of October 15, 1914, c. 323 §1 et seq., 38 Stat. 730, 15 USCA §12 et seq., commonly known as the Clayton Act; as hereinafter more fully appears.

Complaint.

PARTIES PLAINTIFF

2. At all times herein material: George C. Frey, was a resident of Erie County, New York and he died in said County on September 24 , 1970; and Herbert Frey and Lois Muck were, and are, residents of said County and Executors of the Estate of George C. Frey, Deceased, having been duly appointed by the Surrogate of Erie County, New York, and having thereafter duly qualified as such Executors serving (all hereafter "Frey").

3. At all times herein material plaintiffs George C. Frey Ready-Mixed Concrete, Inc. (hereafter "Frey Ready-Mixed") and George C. Frey Batching Plant, Inc. (hereafter "Frey Batching"), were Corporations of New York with their principal offices and places of business being in the County of Erie, New York.

PARTIES DEFENDANT AND CO-CONSPIRATORS

4. At all times herein material defendants Pine Hill Concrete Mix Corp. (hereafter "Pine Hill"), Regent Sand & Gravel Corp. (hereafter "Regent"), and Pfohl Brothers, Inc. (hereafter Pfohl Bros.") were Corporations of New York with their principal offices and places of business being in the County of Erie, New York.

5. At all times herein material defendant Ludwig F. Kahle (hereafter "Kahle") was a resident of Erie County, New York and was the majority shareholder and controlling officer and director of Regent and Pine Hill, as well as of defendant Pfohl Brothers, Inc. from in or about 1957.

6. At all times herein material defendants Joseph Pfohl, Paul M. Pfohl and Fidelis H. Pfohl (hereafter collectively "Pfohls") were residents of Erie County, New York.

7. Pfohl Bros. was dissolved in 1957 by Kahle and/or Pfohls, who were its controlling and surviving Directors, Officers, Shareholders, and liquidators, and the receivers of its assets and they remain responsible for its obligations.

THE TRADE OR COMMERCE INVOLVED

8. This action involves trade or commerce among the States, or that part thereof, of purchasing, receiving, storing, producing, mixing, batching, soliciting, selling, distributing, delivering and installing sand, gravel, aggregates, cement, cement products, concrete and/or ready-mixed concrete, as well as materials and business generally related thereto (hereafter "Ready-Mixed business"or "business").

9. Said Ready-Mixed business includes trade, purchases, orders, commerce, sales, deliveries, transportation and/or installation within and across state, federal, national, international and foreign boundaries, as well as to, in, on, and across federal, interstate, state and foreign, county, municipal, private and/or commercial: highways, thruways, super highways, limited access highways: and local streets and thoroughfares; airports; railroads, federal, governmental and defense establishments; other interstate and foreign instrumentalities and/or establishments engaged in interstate trade or commerce, and/or the main arteries, channels, depots, airways, railways, roadways, waterways and other thoroughfares and media of transportation, and the stations, grids, networks, pipe lines, channels, air waves and media of power, fuel, radio, television, telephone, telegraph and communications; and other media of local as well as interstate and/or foreign trade and commerce.

10. Said Ready-Mixed business is highly competitive in said trade or commerce, and all parts thereof, with the degree of competition being inversly proportional to the distance between any two competitors.

11. At all times herein material, each of the parties plaintiff was directly competitive with each of the parties defendant.

and vice versa, in said trade or commerce, with their respective places of business located in the County of Erie in close and competitive proximity to each other.

12. Said business is highly competitive; and while it may not always involve direct sales or shipments to foreign countries or States, said sales and shipments were to, and directly involved, instrumentalities of, and establishments, media, persons and/or corporations directly engaged in interstate commerce, and the flow of goods, persons, property and merchandise in interstate and foreign commerce; and the hereinafter alleged actions of the defendants, and each of them, has been with the intent, attempt and effect of interfering with, restraining and monopolizing said trade or commerce, or conspiring so to do.

Complaint.

RELATIONSHIP OF THE PARTIES

13. At all times herein material, plaintiffs on the one hand, and defendants Kahle, Pine Hill and Regent on the other, were respectively engaged in said business in competition with each other, and each owned or operated a Ready-Mixed plant on its respective premises located in close proximity to the premises or plant of the other in said Erie County, New York, in said trade or commerce.

14. Gravel is a desirable and for some uses a necessary ingredient and aggregate for concrete in said trade or commerce.

15. Proximately located, efficient and low-priced aggregate or gravel, or gravel supply, washing, classifying and storage facilities and plant are necessary and desirable for a Ready-Mixed business, including that owned by plaintiffs, to be able to efficiently and effectively compete, to meet the needs of the market and its customers, and to compete with the Ready-Mixed business of said defendants.

16. At all times herein material, plaintiffs' said plant and premises, as well as that of defendants Kahle, Pine Hill and Regent, each included in close proximity to their respective Ready-Mixed plants and business, such efficient and low-priced aggregate or gravel source, or gravel supply, washing, classifying and storage facilities and plant

17. At all times herein material, defendants Pfohls were engaged in the gravel business in Erie County and had control of most or substantially all of the gravel sources, supplies, facilities and plants in proximity to plaintiffs' Ready-Mixed plant and facilities, excepting that owned by plaintiffs and defendants prior to in or about 1949 and 1957 respectively.

18. On or about May 17, 1949 plaintiffs sold and conveyed to defendants Pfohls plaintiffs' said premises consisting of approximately 100 acres in the Town of Lancaster, Erie County, New York, including plaintiffs' washing, classifying and storage facilities and plant located thereon, but excluding plaintiffs' Ready-Mixed plant erected thereon.

19. The parties agreed upon certain conditions and covenants for the protection of plaintiffs and their business as part of said sale and conveyance (hereafter "supply agreement" or "agreement") which covenants and conditions included amongst others the covenants and conditions that: Pfohls and their successors would continuously and permanently sell, supply, furnish, wash, classify and deliver to or at, and install the same without charge in the hoppers at, plaintiffs' said Ready-Mixed plant and premises, all gravel required by plaintiffs, whether obtained by Pfohls from said premises or any other of Pfohls' gravel supplies, plants or facilities in Erie County; and, that the price to be charged for said gravel would at all times be the prevailing pit prices which were prevailing in the area, as the same would be mutually agreed upon and fixed by the parties on or before February 1st of each year, and to be effective on or after April 1st of said year, after deducting therefrom a discount of 20%, plus 2% for prompt payment, or a total discount of 21.6% or a net price of 78.4% of prevailing pit prices in the area, as so agreed upon and fixed; all as more fully set forth in said agreements and the amendments thereto.

20. Said supply agreement and said delivered and installed price provisions thereof were intended to insure plaintiffs of a continuous, proximate, efficient and low cost source of gravel, to enable plaintiffs to efficiently and effectively compete in its said business, Ready-Mixed business and in the market, including with defendants Pine Hill and Kahle in said business.

21. Plaintiffs have each at all times duly performed each and every part of said agreement, sale and conveyance, and each of the covenants and conditions thereof, as well as of any and all amendments thereof, on their respective parts to be performed.

THE WRONGFUL ACTIONS AND CONSPIRACY

22. The hereinafter alleged actions of the defendants and each of them were part of a wrongful, illegal and/or improper plan, scheme, combination, conspiracy, agreement and/or arrangement on the part of defendants, and each of them, acting together, and in concert with each other, for the common, joint, agreed and wrongful plan, purpose and objective of monopolizing and restraining said trade and commerce and said gravel and Ready-Mixed business as well as competition with plaintiffs therein; of injurying plaintiffs, their business, their competitive status, their sale price structure, their gravel source and supply, their gravel and concrete prices and their business potential; for the purpose of acquiring or purchasing at a depressed price plaintiffs' said business and customers; and for the purpose of increasing the sales price on the proposed sale by said defendant Kahle, Pine Hill and Regent of their respective businesses, all in violation of sections 1 and 2, among others, of the Sherman Act and sections 1 and 4, among others, of the Clayton Act.

23. On or about August 1, 1957 defendants Kahle and Pine Hill purchased all of the stock of Pfohl Brothers as well as all or most of the gravel properties, interests and business of the defendants Pfohls, and dissolved Pfohl Brothers on August 26, 1957 without making any disposition of said premises.

24. By reason of the foregoing, plaintiffs' said former premises became subject to reverter and/or reverted to plaintiffs by reason of defendants' failure to comply with the conditions thereof and said dissolution of Pfohl Brothers without any distribution of said premises as an asset or without any assumption of said obligations to plaintiffs.

25. On or about May 1, 1969, Pfohl Brothers purported to draw and record a belated deed ostensibly dated August 31, 1957 purporting to convey to defendant Regent said premises originally owned by plaintiffs and sold and conveyed by plaintiffs to defendants Pfohls on or about May 17, 1949 upon the aforesaid conditions, covenants and agreements.

26. Said purported May 1, 1969 deed belatedly provided that said sale and conveyance to defendant Regent was subject to the aforementioned terms of said agreement of May 17, 1949, as amended, between plaintiffs and defendants Pfohls.

27. Commencing on or about February 6, 1968 and continuing to date, defendants have:

(a) breached and failed and refused to perform or comply with said agreement of May 17, 1949 as amended and the covenants and conditions thereof;

(b) unilaterally raised the price of said gravel to plaintiffs to a high and unreasonable price in excess of the stipulated standard of "prevailing pit prices" and grossly in excess of that which defendant Pine Hill was paying and to an amount that made it impossible for plaintiffs to compete against defendants Pine Hill and Kahle;

(c) refused to allow plaintiffs the discounts on gravel purchases as stipulated and agreed upon in said agreement;

(d) refused to deliver said gravel to plaintiffs' plant and its hoppers without charge as required by said agreement of May 17, 1949 and as theretofore done;

(e) refused to sell any gravel to plaintiffs unless plaintiffs paid the difference between said excessive charges and the amount which plaintiffs had promptly paid pursuant to said agreement;

(f) shut down and refused to operate said gravel supply, washing, classifying and storage plant and facilities at plaintiffs' said plant and premises;

(g) refused to sell or deliver gravel to plaintiffs on credit as required by said agreement and as theretofore been done;

(h) drew and recorded on or about February 11, 1969 and May 1, 1969 purported deeds ostensibly dated August 31, 1957 purporting or attempting to report a conveyance by Pfohl Brothers to defendant Regent said plant and premises formerly owned by plaintiffs, as well as a conveyance of defendants Pfohls other gravel lands and sources;

(i) instituted an unjust and harrassing action in the Supreme Court of the State of New York, Erie County, against plaintiff Frey Ready-Mixed for said excessive charges, which action is still pending;

(j) continued all the while to compete with plaintiffs in said business and to seek to obtain their customers and business;

(k) made attempts to purchase plaintiffs' business for a depressed consideration and for less than the value thereof; and

(l) otherwise monopolized, restrained and injured plaintiffs and their business.

28. The aforesaid actions, refusals and omissions of defendants were with the intent of, and part of an attempt to, secure for said defendants Kahle, Pine Hill and Regent, a present and continuing monopoly in the production, sale and supply of gravel and ready mixed concrete and in said trade and commerce; a present and continuing control by said defendants, as competitors of plaintiffs, of plaintiffs' available gravel sources and supplies; present and continuing limitation and restriction of plaintiffs' ability to compete with defendants in said trade or commerce, and said gravel and Ready-Mixed business with respect to price, market, customers, distance, production, discount, service and otherwise; and a present and continuing agreement, combination, conspiracy, plan, scheme and/or arrangement to accomplish all of the foregoing for the benefit of the defendants and with the purpose and intent of injuring the plaintiffs.

29. Defendants' said actions and injury to plaintiffs in their business in an amount of not less than $250,000.00, the exact amount of which plaintiffs ask this Court to fix and determine, and which amount plaintiffs seek herein, together with interest and trebling thereof as well as punitive damages, costs, disbursements and reasonable attorneys fees to be fixed by this Court, all as provided by law.

30. Defendants' said actions will continue to restrain and monopolize such trade and commerce and plaintiffs' said business unless the defendants are permanently restrained by this Court from continuing the same, all as provided by law.

Complaint.

SECOND CLAIM

31. Repeats the allegations contained in paragraphs 2 through 30 hereof except that in each case where it occurs the allegation "trade or commerce" is amended to refer to "intrastate trade or commerce", and the allegation of the Sherman and/or Clayton Acts is amended to read "New York General Business Law section 340 et seq."

THIRD CLAIM

32. Repeats the allegations contained in paragraphs 2 through 28 and 31 hereof.

33. By reason of the foregoing, defendants have intentionally, wrongfully and willfully failed and refused to perform or carry out the covenants of, and have materially breached, said agreement of May 17, 1949, as amended, and the covenants thereof, and intend to and will continue to so do unless restrained by this Court, all to plaintiffs' damage in the amount of not less than $250,000.00 to date and will continue to cause and will cause such damage to plaintiffs in the future unless restrained by this Court.

34. Plaintiffs have no adequate remedy at law for defendants' said continuing and future breaches and the resulting damage to plaintiffs.

35. By reason of the foregoing, plaintiffs are also entitled to punitive damages in an amount to be determined by the Court.

Complaint.

FOURTH CLAIM

36. Repeats the allegations contained in paragraphs 2 through 28, 31 through 35 hereof.

37. By reason of the foregoing, defendants have intentionally, wrongfully and wilfully failed and refused to perform and carry out the conditions of said agreement of May 17, 1949 as amended and there has been a failure of consideration for said sale and conveyance of plaintiffs' said premises to defendants, and a failure of conditions precedent and conditions subsequent in defendants' title to said premises.

38. By reason of the foregoing, there has been and should be a reverter of title to said premises to plaintiffs and plaintiffs request a declaratory judgment by this Court that said sale or conveyance of May 17, 1949 by plaintiffs to defendants is null and void and that plaintiffs are the sole, equitable and record owners of said premises.

39. Plaintiffs hereby tender and offer return to defendants the purchase price of $36,500 which defendants paid for said sale and conveyance of May 17, 1949.

FIFTH CLAIM

40. Repeats the allegations contained paragraphs 2 through 28 and 31 through 39.

41. Plaintiffs' said sale or conveyance of May 17, 1949 to defendants of plaintiffs' said premises was incomplete, inaccurate, indefinite and failed to convey said premises of good and marketable title thereto.

42. By reason of the foregoing, plaintiffs have at all times been and still are the sole and equitable owners of good and marketable title to said premises purported to be conveyed, but upon information and belief not conveyed by said sale or conveyance of May 17, 1949 and plaintiffs hereby request this Court to grant declaratory judgment to such effect.

SIXTH CLAIM

43. Repeats the allegations contained in paragraphs 2 through 28 and 31 through 42 hereof.

44. Defendants' aforesaid actions and omissions were and were intended to be a wilfull, deliberate, wrongful, intentional, improper, tortious and/or illegal interference with plaintiffs, plaintiffs' business, plaintiffs' ability to compete with defendants, plaintiffs' advantageous business relations, plaintiffs' contract, plaintiffs' advantageous contractual arrangements, plaintiffs' sources of raw materials and plaintiffs' valuable business rights, privileges and goodwill, all to plaintiffs' damage and for the purpose of benefiting defendants, defendants' business, defendants' competitive ability and defendants' rights and privileges.

45. By reason of the foregoing, plaintiffs are entitled to damages against defendants in the sum of not less than $250,000.00 for damages to date and punitive damages in an amount to be fixed by this Court.

WHEREFORE, plaintiffs request judgment against the defendants for damages to date in the amount of not less than $250,000.00, together with interest (and trebling thereof under the FIRST CLAIM); a permanent injunction restraining defendants from continuing the actions alleged in the complaint, or an amount to be determined by this Court for future damages; declaratory judgment that plaintiffs are the sole, legal, record and equitable owners of the premises conveyed by them to defendants by said conveyance dated May 17, 1949 by reason of a reverter or reversion of title conveyed and/or an insufficient title in defendants; all together with the costs and disbursements of this action, interest and reasonable attorneys fees as provided for by law; and for such other and further relief as may be just and proper in the premises.

PLEASE TAKE NOTICE that plaintiffs demand a trial by jury of each of the issues of fact herein.

Dated: Buffalo, New York
June 15, 1970

RATCHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss
A Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Tel: (716) 852 7587

Answer.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY and LOIS HUCK as Co-Executors
of the ESTATE OF GEORGE C. FREY, Deceased

Plaintiffs

vs.

Civil Action No. 1970 - 277
ANSWER

PINE HILL CONCRETE MIX CORP.
REGENT SAND & GRAVEL, CORP.
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL, and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC., a
dissolved corporation, and
PFOHL BROTHERS, INC.

Defendants

* *

The defendants, appearing herein by McDONOUGH, BOASBERG, McDONOUGH & BELTZ, their attorneys, in answer to the plaintiffs' complaint:

1. Deny having knowledge or information sufficient to form a belief as to the allegations numbered 1, 2, 3, 8, 9, 10, 11, 14, 15, 16 and 39.

2. Admit the allegations of paragraphs numbered 4 and 5 thereof, except that the defendants deny the allegations of said paragraphs 4 and 5 with respect to Pfohl Brothers, Inc.

3. Admit the allegations of paragraph 6 thereof with respect to the defendants Joseph Pfohl and Fidelis H. Pfohl, but deny the allegations thereof with respect to the defendant Paul M. Pfohl.

4. Deny each and every other allegation in said complaint contained.

FOR A FIRST SEPARATE AFFIRMATIVE DEFENSE, THE DEFENDANTS ALLEGE, ON INFORMATION AND BELIEF:

5. That the plaintiffs' complaint fails to state a claim or claims against the defendants upon which relief can be granted.

FOR A SECOND SEPARATE AFFIRMATIVE DEFENSE, THE DEFENDANTS ALLEGE, ON INFORMATION AND BELIEF:

6. That none of the alleged causes of action and/or claims set forth in the complaint accrued within the time limited by law for the commencement of this action.

FOR A THIRD SEPARATE AFFIRMATIVE DEFENSE AND WITH RESPECT TO THE ALLEGATIONS OF PARAGRAPH 31 OF THE COMPLAINT, DESIGNATED "SECOND CLAIM", THE DEFENDANTS ALLEGE, ON INFORMATION AND BELIEF:

7. That with respect to the allegations of paragraph 31 of the plaintiffs' complaint, this court has jurisdictio neither over the subject matter of the claim, nor over the persons of any of the defendants.

FOR A FOURTH SEPARATE AFFIRMATIVE DEFENSE AND WITH RESPECT TO THE ALLEGATIONS OF PARAGRAPHS 32 THROUGH 35 OF THE COMPLAINT, DESIGNATED "THIRD CLAIM", THE DEFENDANTS ALLEGE, ON INFORMATION AND BELIEF:

8. That with respect to the allegations of paragraphs 32 through 35 of the plaintiffs' complaint, this court has jurisdiction neither over the subject matter of the claim, nor over the persons of any of the defendants.

FOR A FIFTH SEPARATE AFFIRMATIVE DEFENSE AND WITH RESPECT TO THE ALLEGATIONS OF PARAGRAPHS 36 THROUGH 39 OF THE COMPLAINT, DESIGNATED "FOURTH CLAIM", THE DEFENDANTS ALLEGE, ON INFORMATION AND BELIEF:

9. That with respect to the allegations of paragraphs 36 through 39 of the plaintiffs' complaint, this court has jurisdiction neither over the subject matter of the claim, nor over the persons of any of the defendants.

FOR A SIXTH SEPARATE AFFIRMATIVE DEFENSE AND WITH

RESPECT TO THE ALLEGATIONS OF PARAGRAPHS 40 THROUGH 42 OF THE COMPLAINT, DESIGNATED "FIFTH CLAIM", THE DEFENDANTS ALLEGE, ON INFORMATION AND BELIEF:

10. That with respect to the allegations of paragraphs 40 through 42 of the plaintiffs' complaint, this court has jurisdiction neither over the subject matter of the claim, nor over the persons of any of the defendants.

FOR A SEVENTH SEPARATE AFFIRMATIVE DEFENSE AND WITH RESPECT TO THE ALLEGATIONS OF PARAGRAPHS 43 THROUGH 45 OF THE COMPLAINT, DESIGNATED "SIXTH CLAIM", THE DEFENDANTS ALLEGE, ON INFORMATION AND BELIEF:

11. That with respect to the allegations of paragraphs 43 through 45 of the plaintiffs' complaint, this court has jurisdiction neither over the subject matter of the claim, nor over the persons of any of the defendants.

FOR AN EIGHTH SEPARATE AFFIRMATIVE DEFENSE, THE DEFENDANT PAUL M. PFOHL ALLEGES, ON INFORMATION AND BELIEF:

12. That the defendant Paul M. Pfohl is a resident of the State of Oregon, and not a resident of the State of New York or of the Western District of New York; and the court does not have jurisdiction of the person of the defendant Paul M. Pfohl.

Answer.

WHEREFORE, the defendants demand judgment dismissing the plaintiffs' complaint, granting the defendants such other and further relief herein as may be just and proper, together with the costs and disbursements of this action.

Dated: July 27, 1970

McDONOUGH, BOASBERG, McDONOUGH & BELTZ

by CHARLES J. McDONOUGH
CHARLES J. McDONOUGH
A Member of the Firm
Attorneys for the Defendants
Office and Post Office Address
930 Walbridge Building
Buffalo, New York 14202

Defendants' Motion for Discovery and Inspection.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC. and
HERBERT FREY and LOIS MUCK as Co-Executors
of the ESTATE OF GEORGE C. FREY, Deceased

Plaintiffs

Civil Action No. 1970 - 277

vs.

PINE HILL CONCRETE MIX CORP.
REGENT SAND & GRAVEL, CORP.
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL, and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC., a
dissolved corporation, and
PFOHL BROTHERS, INC.

Defendants

* *

PLEASE TAKE NOTICE that upon the pleadings herein, the annexed affidavit of CHARLES J. McDONOUGH of counsel for the defendants, sworn to July 28, 1970, and upon all other proceedings heretofore had herein, the defendants will move this court at a Term thereof, to be held in the United States Court House in the City of Buffalo, New York, on the 17th day of August, 1970, at 10:00 a. m., or as soon thereafter as counsel can be heard, for an order requiring the plaintiffs to produce and permit the defendants to inspect and copy the following documents, all of which are in the possession, custody or control of the plaintiffs,

and all of which constitute or contain evidence relevant and material to the issues in this action:

1.) All records of stockholders' and directors' meetings of the plaintiffs GEORGE C. FREY READY-MIXED CONCRETE, INC. and GEORGE C. FREY BATCHING PLANT, INC. from January 1, 1949 to the date of said discovery and inspection.

2.) All deeds, leases, contracts, agreements, correspondence, records and documents of every kind of the two plaintiff corporations and of George C. Frey, deceased, with respect to the agreement dated May 17, 1949, between George C. Frey and Pfohl Brothers, Inc., as well as all subsequent amendments thereto, between January 1, 1949 and up to and including the date of such discovery and inspection.

3.) All annual and other financial statements, corporate and personal income tax returns, both Federal and State, of the two corporate plaintiffs, and of the late George C. Frey, deceased, from January 1, 1949 up to and including the date of such discovery and inspection.

4.) All financial statements, both annual and otherwise, and all corporate income tax returns, both Federal and State, of any and all corporations owned or controlled by any or all of the plaintiffs, from January 1, 1949 up to and including the date of said discovery and inspection.

5.) All correspondence, bills, invoices, price schedules, price lists, records and documents of every kind with respect to "purchasing, receiving, storing, producing, mixing, batching, soliciting, selling, distributing, delivering and installing sand, gravel, aggregates, cement, cement products, concrete and/or ready-mixed concrete, as well as materials and business generally related thereto" (complaint, paragraph 8) engaged in by all of the plaintiffs, including George C. Frey, deceased, with any and all of their customers and suppliers, from January 1, 1949 up to and including the date of said discovery and inspection.

6.) Any and all other records and documents relevant to the plaintiffs' claim of "damages in the amount of not less then $250,000.00" as alleged in the complaint (paragraph 29).

Dated: July 28, 1970

McDONOUGH, BOASBERG, McDONOUGH & BELTZ

by CHARLES J. McDONOUGH
CHARLES J. McDONOUGH
A Member of the Firm
Attorneys for the Defendants
Office and Post Office Address
930 Walbridge Building
Buffalo, New York 14202

TO:

RAICHLE, BANNING, WEISS & HALPERN
Attorneys for the Plaintiffs
10 Lafayette Square
Buffalo, New York 14203

Defendants' Motion for Discovery and Inspection.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY and LOIS MUCK as Co-Executors
of the ESTATE OF GEORGE C. FREY, Deceased

Plaintiffs

Civil Action No. 1970 - 277

vs.

PINE HILL CONCRETE MIX CORP.
REGENT SAND & GRAVEL, CORP.
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL, and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC., a
dissolved corporation, and
PFOHL BROTHERS, INC.

Defendants

* *

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

CHARLES J. McDONOUGH, being duly sworn, deposes and says:

That he is the attorney for the defendants herein.

This affidavit is submitted in support of the defendants' motion under Rule 34 for an order of discovery and inspection of certain documents and records, as set forth in the annexed notice of motion.

Defendants' Motion for Discovery and Inspection.

The plaintiffs' first and chief cause of action, alleged in the complaint, is for violation of the Sherman Anti-Trust Act and the Clayton Act (15 USCA, §1 et seq.). The plaintiffs claim that commencing May 17, 1949, and continuing up to the present date, all of the defendants have conspired to monopolize and restrain trade and commerce with respect to the gravel and ready-mix concrete business in Western New York, and to interfere with and destroy the ability of the plaintiffs to compete in said business (complaint, paragraph 22 through 28.).

The plaintiffs claim damages of "not less then $250,000.00", and demand treble damages, as well as punitive damages (complaint, paragraph 29).

The plaintiffs also demand injunctive relief, and a declaratory judgment that title to the premises conveyed in 1949 has reverted to the plaintiffs.

The defendants' answer denies the material allegations of the plaintiffs' complaint, and sets up several affirmative defenses, including the statute of limitations, and challenging the jurisdiction of the court with respect to the person of the defendant Paul M. Pfohl, and the jurisdiction of the court with respect to the subject matter of the second, third, fourth, fifth and sixth claims asserted in the complaint.

Defendants' Motion for Discovery and Inspection.

Deponent begs leave to incorporate by reference, in this affidavit, the allegations of the complaint and answer, the originals of which will be before the court upon argument of this motion.

On information and belief, on or about May 17, 1949, and for a valuable consideration, George C. Frey conveyed to Pfohl Brothers, Inc. certain real property in the Town of Lancaster, New York, which contained deposits of sand, grit and gravel. Pfohl Brothers, Inc., agreed to lease a portion of said premises to George C. Frey, including a concrete batching plant, and to sell and deliver to Frey sand, grit and gravel for use in Frey's Batching Plant. This agreement was to run for 15 years, and contained certain termination and renewal options, which are in dispute by the parties hereto.

The complaint alleges that George C. Frey died on September 24, 1969. On information and belief, the plaintiffs Herbert Frey and Lois Muck are the son and daughter, respectively, of George C. Frey, deceased, and are the executors under his Last Will and Testament.

On information and belief, both Herbert Frey, Lois Muck and their mother, Mrs. George C. Frey, the widow of the deceased George C. Frey, are stockholders, directors and officers of both the plaintiff corporations, George C. Frey Ready-Mixed Concrete, Inc. and George C. Frey Batching Plant, Inc.

While the claims of the plaintiffs are in part based upon alleged violations of the agreement of May 17, 1949, the complaint goes considerably further.

According to the complaint, all of the parties hereto are engaged in either the ready-mixed concrete business, or in the business of production, sale and transportation of sand, grit, gravel and other components of ready-mixed concrete, in Western New York.

The complaint furth alleges that said business if "highly competitive" and that all of the plaintiffs and all of the defendants are engaged in interstate commerce.

The complaint further alleges a continuing conspiracy, on the part of all of the defendants, from May 17, 1949, up to the present time, to monopolize and restrain trade and commerce in the gravel and ready-mixed concrete business, and to injure and destroy the competitive status of the plaintiffs in said business. The complaint alleges many actions upon the part of the defendants, from 1949 to date, in violation of the agreement of May 17, 1949, in controlling the price of gravel to the plaintiffs, and in otherwise monopolizing and restraining and injuring the plaintiffs and their business; all in an attempt to monopolize the business for the benefit of the defendants (complaint, paragraph 22 through 28).

All of these allegations are denied by the answer herein.

In order to properly prepare for the trial of this action, the defendants will require a thorough examination and inspection of all of the documents and records set forth in the annexed notice of motion.

On information and belief, all of these documents are in the possession and control of the plaintiffs, their officers, agents and employees, and all are relevant to the issues in this action.

The defendants on this date are also serving upon the attorneys for the plaintiffs, a notice to take the depositions of the plaintiffs through Herbert Frey, Lois Muck, Mrs. George C. Frey and such other officers, agents and employees of the plaintiffs as have knowledge of the facts; said depositions to be held at the offices of McDONOUGH, BOASBERG, McDONOUGH & BELTZ, No. 930 Walbridge Building, Buffalo, New York commencing on September 2, 1970, at 10:00 a. m., and continuing thereafter from day to day.

Deponent therefore prays that an order enter under Rule 34, directing a discovery and inspection of the various documents and records set forth in the annexed notice of motion, prior to and in conjunction with the depositions of the plaintiffs

herein; and granting the defendants such other and further relief herein as may be just and proper.

CHARLES J. McDONOUGH

Sworn to before me this
28th day of July, 1970.

ROBERT BOASBERG
Notary Public; Erie County, New York

ROBERT BOASBERG
Notary Public State of New York
Qualified in Erie County
My Commission expires Mar. 30, 1971

Defendants' Notice of Depositions.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC. and
HERBERT FREY and LOIS MUCK as Co-Executors
of the ESTATE OF GEORGE C. FREY, Deceased

Plaintiffs

Civil Action No. 1970 - 277

vs.

NOTICE OF DEPOSITION

PINE HILL CONCRETE MIX CORP.
REGENT SAND & GRAVEL, CORP.
LUDWIG F. KARLE, JOSEPH PFOHL,
PAUL M. PFOHL, and FIDELIS M.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC., a
dissolved corporation, and
PFOHL BROTHERS, INC.

Defendants

* *

PLEASE TAKE NOTICE that on September 2, 1970 at 10:00 a. m., at the offices of McDONOUGH, BOASBERG, McDONOUGH & BELTZ, No. 930 Walbridge Building, Buffalo, New York, the defendants will take the deposition of the plaintiffs, GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., HERBERT FREY and LOIS MUCK as co-executors of the Estate of George C. Frey, deceased, the plaintiffs in the above action; through Herbert Frey, Lois Muck, Mrs. George C. Frey, and through such other officers, agents and employees of the plaintiff as have knowledge of the facts.

Defendants' Notice of Depositions.

The depositions will be taken upon oral questions, pursuant to the Federal Rules of Civil Procedure, before a notary public or any other officer authorized by law to administer oaths

The said depositions will continue from day to day until completed.

Dated: July 28, 1970

McDONOUGH, BOASBERG, McDONOUGH & BELTZ

by CHARLES J. McDONOUGH
CHARLES J. McDONOUGH
A Member of the Firm
Attorneys for the Defendants
Office and Post Office Address
930 Walbridge Building
Buffalo, New York 14202

TO:

RAICHLE, BANNING, WEISS & HALPERN
Attorneys for the Plaintiffs
10 Lafayette Square
Buffalo, New York 14203

Order Granting Defendants' Motion for Discovery and Inspection, September 15, 1970.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., et al.

v.

Civ- 1970-277

PINE HILL CONCRETE MIX CORP., et al.

SIR: Take notice of an ORDER, of which the within is a copy, duly granted in the within entitled action on the 15th day of September, 1970, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 15th day of September, 1970.

Dated: Buffalo, New York

Sept. 15, 1970

JOHN K. ADAMS
[redacted], Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

To Raichle, Banning, Weiss & Halpern
Attorney for Plaintiff

To _____
Attorney for Defendant

FEDERAL RULES OF CIVIL PROCEDURE 77(d)

Order Granting Defendants' Motion for Discovery and Inspection, September 15, 1970.

At a Special Term of the United States District Court, Western District of New York held in the United States Court House in the City of Buffalo, New York, on the 4th day of September 1970

PRESENT: HON. JOHN T. CURTIN

United States District Judge

UNITED STATES DISTRICT COURT: WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC. and
HERBERT FREY and LOIS MUCK as co-executors
of the Estate of GEORGE C. FREY, Deceased

Plaintiffs CIVIL ACTION No. 1970-277

-vs-

PINE HILL CONCRETE CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PROHL, PAUL M. PFOHL, and FIDELIS H. PFOHL, individually and as the controlling and surviving directors, officers, shareholders, liquidators and receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants

The defendants having moved for an order, requiring the plaintiffs to produce and permit the defendants to inspect and copy certain documents, all of which are in the possession, custody or control of the plaintiffs, and all of which constitute or contain evidence relevant and material to the issues in this action; and the said motion having duly come on to be heard;

And the court having read and filed the pleadings herein, the notice of motion, dated July 28, 1970; the supporting affidavit of CHARLES J. McDONOUGH, attorney for the moving defendants

sworn to July 28, 1970; all submitted in support of said motion; and the court having heard CHARLES J. McDONOUGH, attorney for the moving defendants, in support and said motion and no one appearing in opposition thereto;

NOW, on motion of McDONOUGH BOASBERG McDONOUGH & BELTZ, attorneys for the defendants, it is hereby

ORDERED, that the plaintiffs produce and permit the defendants and their attorneys to inspect and copy the following documents, said discovery and inspection to be held at No. 930 Walbridge Building, Buffalo, New York, on such date or dates as shall be mutually convenient to the attorneys for the parties hereto:

1) All records of stockholders' and directors' meetings of the plaintiffs GEORGE C. FREY READY-MIXED CONCRETE, INC. and GEORGE C. FREY BATCHING PLANT, INC. from January 1, 1949 to the date of said discovery and inspection.

2) All deeds, leases, contracts, agreements, correspondence, records and documents of every kind of the two plaintiff corporations and of George C. Frey, deceased, with respect to the agreement dated May 17, 1949, between George C. Frey and Pfohl Brothers, Inc., as well as all subsequent amendments thereto, between January 1, 1949 and up to and including the date of such discovery and inspection.

3) All annual and other financial statements, corporate and personal income tax returns, both federal and state,

of the two corporate plaintiffs, and of the late George C. Frey, deceased, from January 1, 1949 up to and including the date of such discovery and inspection.

4) All financial statements, both annual and otherwise, and all corporate income tax returns, both federal and state, of any and all corporations owned or controlled by any or all of the plaintiffs, from January 1, 1949 up to and including the date of said discovery and inspection.

5) All correspondence, bills, invoices, price schedules, price lists, records and documents of every kind with respect to "purchasing, receiving, storing, producing, mixing, batching, soliciting, selling, distributing, delivering and installing sand, gravel, aggregates, cement, cement products, concrete and/or ready-mixed concrete, as well as materials and business generally related thereto" (Complaint, Paragraph 8) engaged in by all of the plaintiffs, including George C. Frey, deceased, with any and all of their customers and suppliers, from January 1, 1949 up to and including the date of said discovery and inspection.

6) Any and all other records and documents relevant to the plaintiffs' claim of "damages in the amount of not less than $250,000.00" as alleged in the complaint (Paragraph 29).

John T. Curtin
UNITED STATES DISTRICT JUDGE.

Dated: September 15, 1970

Plaintiffs' First Interrogatories to Defendants.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.; GEORGE C. FREY BATCHING PLANT, INC.; and HERBERT FREY and LOIS MUCK as Co-Executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

Civil Action
No. 1970-277

vs.

PINE HILL CONCRETE MIX CORP.; REGENT SAND & GRAVEL CORP.; LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL, and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, liquidators and receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation; and PFOHL BROTHERS, INC.,

Defendants.

PLAINTIFFS' FIRST INTERROGATORIES TO DEFENDANTS.

INSTRUCTIONS FOR INTERROGATORIES TO DEFENDANTS

Plaintiffs hereby separately propound to each defendant herein, and each defendant herein is required to separately in a separate set of answers, each of the following Interrogatories within fifteen days:

The following instructions shall be deemed to be applicable to and incorporated in each interrogatory to each defendant:

A. In each case, set forth the knowledge, information, documents or evidence in the possession or control of said

defendant, or its officers, directors, stockholders, controllers, affiliates, predecessors, employees, agents, or representatives, or other persons, firms or entities, directly or indirectly, under its direction or control.

B. The terms "you", "defendant(s)" or "plaintiff(s)" includes each defendant or plaintiff, and any of its officers, directors, predecessors, stockholders, controllers, affiliates, employees, agents or representatives, or other persons, firms or entities, directly or indirectly, under its direction or control.

C. In each case where referring to any utterance, time, occasions, meeting, Agreement, control, understanding, statement, conversation or other event, set forth: (1) the place, time and date when and where the same occurred, and the persons present; (2) a copy thereof if written; or (3) if oral, substance thereof and the persons making the same or participating therein.

D. In each case, unless otherwise specifically stated, the Interrogatory covers, and your answer should include, the entire period, and each and every event, occasion, conversation, circumstance, change of circumstance, matter, communication, meeting, agreement, understanding, act or statement during the period, January 1, 1947 to date.

INTERROGATORIES PROPOUNDED BY PLAINTIFFS TO EACH DEFENDANT AND TO BE ANSWERED SEPARATELY BY EACH DEFENDANT.

1. Set forth:

A. Your business, assumed or corporate name, or identity; your address; your officers and/or places of business; and the location of your principal office and place of business.

B. The date of the formation or incorporation of your business, corporation or entity.

C. A copy of any Certificate of Doing Business under an Assumed Name, Partnership Agreement or Certificate of Incorporation, including any amendments to date.

D. The general nature and description of each business or business ventures engaged in by you, together with the locations thereof.

E. The names of all persons, partnerships, business firms, corporations or entities which own any stock, equity, shares, debt, rights, collateral security, securities, secured interests, options, rights or other interests of a financial, legal record or equitable nature in your Company or in any company, entity, corporation or organization owned or controlled by you.

2. Set forth the extent, nature and dates of any and all businesses, ventures, partnerships, contracts, agreements, affiliations or other relationships, of, by, between, with or concerning:

A. Any one or more of defendants with any one or more of any other defendants.

B. Any one or more of defendants with any one or more of plaintiffs.

C. Any one or more of the defendants with any other one or more third persons, firms, corporations or entities, with

respect to: sand, grit, gravel, ready-mixed concrete, asphalt or construction materials, or the sale, provision, installation, lease, discounting, wholesaling, supply, use or other provision for or dealing therein or thereof (other than ordinary day-to-day sales in the normal course of business).

D. Any one or more of the defendants with any person, firm or corporation with respect to: the digging, purchasing, obtaining, supplying, furnishing, securing, mining, sorting, classifying, warehousing, reserving, locating, selling, leasing, using, or otherwise relating to sources of your supplies, production, reserving or warehousing of sand, grit or gravel used or useful for ready-mixed concrete.

E. Any defendant or any other person, firm or corporation, including but not limited to any of plaintiffs, who at any time received, was entitled to receive, requested, obtained, was granted, had an agreement granting, or otherwise received

the benefit of, any discount, price reduction, quantity discount, rebate, credits (other than in the ordinary course of business) return considerations or other benefits with respect to sand, grit or gravel.

3. With respect to any sale, transfer, assignment, lease, supply, use, installation, provision or other similar transaction relating to sand, grit or gravel state:

A. Have you ever utilized, published or conformed to any formula to determine the price or consideration therefor? If so, set forth a copy thereof.

B. Have you ever utilized, published or conformed to any price lists, price tables, price structures, price memos or other pricing device or document setting the price thereof? If so, set forth a copy of any such listing or document.

C. Do you have in your possession any knowledge, memoranda, formula, lists or other evidence of prevailing pit prices therefor from any quarry, pit, or supplier thereof, including yourself and any of the other defendants? If so, set forth copies thereof

if in writing, or if not written, the substance of such knowledge or evidence.

D. Have you ever charged more or less to any customer or to any other customer, or otherwise utilized any non-uniform price list, or price structure whether based on quantity, quality, grade, destination, or other factor or consideration? If so, identify the same and set forth copies thereof if written, or if not written, the substance thereof, the periods involved, customers who received the same or benefited therefrom, and in each case the extent of said discount or benefit together with the periods, items and quantities involved.

E. Have you ever bid on, proposed, offered, or otherwise attempted to sell or supply sand, grit or gravel to any customer, contractor, user or other person, firm or corporation, or pursuant to any public or private bid therefor, at any price other than your published formula or list price identified in your answers to Interrogatory 3A and 3B? If so, for each occasion or attempt, set forth the proposed customer

and bid, the location, the quantity, the quality, the grade, the item, price and other conditions involved.

4. Do you sell, supply, install, provide, offer or otherwise merchandise grit, sand or gravel on a delivered price, F.O.B. price, transportation allowance, transportation charge or surcharge or delivered or non-delivered basis? If so:

A. State whether your formula or list prices referred to in Interrogatory 3A and 3B relate to a delivered or F.O.B. price therefor.

B. Have you ever deviated from said delivered or F.O.B. basis for any customer or with respect to any sale, supply, offer, attempt to sell, provision, installation or other merchandising of sand, grit or gravel? If so, state for each customer and occasion the date, quantity, quality, grade, item and amount involved.

C. State the criteria, reasons and considerations which modified, justified or required any such deviation with respect to delivery from said formula or list price for each specific deviation.

D. Have any of the defendants ever sold to any of the plaintiffs any sand, grit or gravel on a delivered price basis? If so, state the period involved, the quantity, quality, grade, item and amounts involved.

E. For each period or occasion involved pursuant to Interrogatory 4D specify whether there was any agreement, contract, arrangement or understanding making provision therefor. If so, set forth a copy thereof if written or the substance thereof if oral; as well as the period during which the same was in effect or carried out.

5. Have you ever given, granted, offered, made, transmitted, paid or furnished, or have you solicited, sought, received, obtained or benefited from, any discount, quantity discount, job discount, contract discount, rebate, refund, credit (other than in the ordinary course of business) reimbursement or other similar benefit, directly or indirectly, from, in or with respect to the sale, supply, furnishing, provision, installation, use of sand, grit or gravel from, to or with any other person, firm or corporation, including but not limited to, any of the parties herein? If so, state:

A. Each occasion and customer including the quantity, quality, grade, item, amount, destination, delivery and other economic or other factor involved.

B. In each case, state whether the same was pursuant to any published or promulgated formula, price list or price structure. If so, set forth a copy thereof if written or the substance thereof if oral.

C. State whether any of the same were ever offered to any of the plaintiffs.

D. State whether to your knowledge any other persons, firms or corporations have engaged in similar practices or policies. If so, state their identity, as well as the dates, periods, items and transactions involved, including any copy thereof in your possession if written or the substance thereof if oral.

E. Have you ever offered or granted to any of the plaintiffs any of said discounts, quantity discounts, rebates, reductions, credits, etc. which you have offered or

granted to any other person, firm or corporation? If so, state for each occasion the time and place, when and where the same occurred, the persons present and representing the plaintiffs and defendants involved, and the substance of any communication if oral or a copy thereof if written.

F. State whether any of the defendants has had any intercompany credits, charges or reductions, adjustments, modifications, additions, or any bookkeeping adjustments with respect to any sales or purchases of sand, grit and gravel to or from any of the other defendants. If so, for any occasion, identify the defendants involved and the details of the sale and purchase as well as of the adjustment or bookkeeping change.

6. Do any of the defendants file consolidated income tax returns with any of the other defendants? If so, state:

A. The companies and periods involved.

B. Whether any company selling, supplying, purchasing or acquiring sand, grit or gravel from any other defendant has either sustained a loss

thereon or earned less than the percentage of profit which it earned with respect to sales to any customer other than said defendant. If so, identify the companies, sales, periods and adjustments involved.

7. Have any of the plaintiffs ever entered into any agreement, arrangement, contract or understanding with any of the defendants relating to the sale, supply, provision, purchase, furnishing, etc. of sand, grit or gravel? If so, state:

A. The date of and parties to each such agreement, arrangement, contract or understanding. If written, set forth a copy thereof. If oral, the substance thereof, including the time and place, when and where made, and the persons present and representing the respective parties.

B. Have any of said agreements, arrangements, contracts or understandings ever been modified, amended, supplemented or terminated? If so, set forth a copy thereof if written; if oral the substance thereof, including the time and place, when and where made, and the persons present and representing the respective parties.

Plaintiffs' First Interrogatories to Defendants.

C. Have any of the defendants ever failed to perform, carry out or comply with the terms of any of said contracts, arrangements, understandings or agreements, or any of said supplements, modifications or amendments thereto? If so, for each case state the dates and reasons therefor, the manner in which the same was communicated to any of the plaintiffs, including a copy thereof if written, or the substance thereof if oral, including the time and place, when and where communicated and the persons present and representing the respective parties.

D. Have any of said agreements, arrangements,contracts or understandings, or any of said supplements, modifications or amendments thereto ever been terminated, rescinded, breached, expired, without effect, suspended, by reason of any alleged or purported conduct, act or omission on the part of any of the plaintiffs? If so, specify for each said agreement, arrangement, contract or understanding, and any said supplement, modification or amendment thereto, the time and place, when and where the same occurred, the nature thereof,

when you have first had notice thereof, and when and in what manner notice thereof or of your reaction thereto was first conveyed to any of the plaintiffs including a copy thereof if written, or the substance thereof if oral, including the time and place, when and where the same was communicated, and the persons present and representing the respective parties.

E. Specify which agreements, contracts, understandings or arrangements between any of the plaintiffs and any of the defendants, and which amendments, modifications or supplements thereof or thereto, you now recognize as being in full or partial force and effect and which thereof each defendant considers to be of no further or partial or limited force and effect. Specify for each thereof, the date that said recognition commenced and was modified or terminated; the reasons therefor; the means of notification thereof, if any, to any of the plaintiffs including a copy thereof if written, or the substance thereof if oral including the time and place, when and where made, and the names of the persons participating and representing the respective parties.

Plaintiffs' First Interrogatories to Defendants.

F. Have you ever claimed, or do you now claim that plaintiffs, or any of them, have been or have caused a default, breach, termination, cancellation, or other similar cessation of effectiveness or requirement for further performance on your part of any said agreement, arrangement, contract, understanding, or any modification, amendment or supplement thereto? If so, for each thereof state the exact nature of any such claim, act, conduct or omission, the name of the defendant(s) and plaintiff(s) involved, the time and place, when and where the same occurred or failed to occur, whether you gave any notice that plaintiff(s) tender said performance, cure said omission, or cease said conduct, and/or the consequences of failing so to do. If so, please set forth a copy thereof if in writing, or the substance thereof if oral, together with the time and place, when and where made, and the persons participating and/or representing the respective parties.

G. State which, if any, arrangements, agreements, contracts or understandings, or any modifications, supplements or amendments thereto you consider will become effective or applicable upon the payment to you of any sum, account, bill or item alleged to be due and owing, or the performance of any act or acts, the performance of which is alleged to be required. For each thereof, set forth the nature of said bill, account or act, the date, amount or nature thereof, as well as the consideration therefor.

8. Did you ever sell, assign, deed, mortgage, convey, dispose of or transfer to any other plaintiff or any other person, firm or corporation any part of your right, title or interest in and to any lease, agreement, deed, instrument, understanding or arrangement, or any supplement, modification or amendment thereto, with any of the plaintiffs, including but not limited to, a deed, and a Lease and Agreement, dated May 17, 1949 between plaintiff George C. Frey, and defendant Pfohl Bros. Inc., an Agreement dated November 4, 1950 between the defendants Pfohl and plaintiff George Frey Batching Plant, Inc., or any extension, amendment, supplement or modification thereof or thereto, or of any property or premises conveyed thereby? If so, state:

Plaintiffs' First Interrogatories to Defendants.

A. The name of the person, firm or corporation involved, the nature of the interest assigned, transferred, deeded, etc., the consideration therefor, the date of payment and receipt of said consideration, the date of execution of any instrument, the date of acknowledgement of any such instrument, the date of recording any such instrument, the nature of your affiliation or association with said assignee or grantee, etc., and the purpose thereof.

B. If any thereof is represented or evidenced by a written instrument, please annex a copy thereof. If not written, set forth the substance thereof, including the date and place, when and where made, and the persons participating and representing the parties involved.

C. If any thereof is represented by a written instrument, please state if you will agree to submit said original document for expert examination as to the age thereof and the writing thereof. If you are not agreeable to do so, please state your reasons therefor.

Plaintiffs' First Interrogatories to Defendants.

D. Is any of said sales, assignments, conveyances, mortgages or grants subject to performance by the assignee or grantee, etc. of the obligations provided therein, and the performance of the rights, duties and obligations owed to any of the plaintiffs? If so, set forth a copy of any written instrument evidencing the same, or if oral, set forth the substance thereof, the time and place, when and where made, and the persons present or participating and representing the parties involved.

E. What, if any, had the primary responsibility and which, if any, had a secondary responsibility, for supplying any of the plaintiffs with sand, grit or gravel as provided in the Lease and Agreement dated May 17, 1949 between plaintiff George C. Frey, and defendant Pfohl Bros., Inc., as extended, supplemented, modified or amended, at prevailing pit prices to be "adjusted and fixed on separate written schedule by mutual agreement once each year as of April 1 * * * less 20%, plus 2% discount if paid before

the 10th of month," and delivered to plaintiffs' Batcher Plant during the period:

1. May 17, 1949 to July 31, 1957;
2. May 17, 1949 to May 17, 1964;
3. August 1, 1957 to May 17, 1964;
4. August 1, 1957 to date;
5. May 17, 1964 to date;
6. August 1, 1957 to December 31, 1968;
7. May 17, 1964 to December 31, 1968;
8. Calendar Year 1968; and
9. Calendar Year 1969.

F. Is there now or has there ever been hold-harmless indemnity, insurance, guarantee, or other agreement, understanding or arrangement between and any other defendants or any other person, firm or corporation relating to the performance, or lack of performance, of any obligations to plaintiffs under said Deed, said Lease and Agreement, and said other agreements, understandings, arrangements and contracts, as extended, amended, supplemented or modified, or with respect to any claim asserted by any plaintiff herein, or at any time or place with respect thereto? If so,

set forth copies thereof if written, or the substance thereof if oral, including the time and place, when and where made and the persons present or participating on behalf of the respective parties.

9. With respect to each business conducted by you in which there was involved the sale, supply, provision, installation, offering, quoting or otherwise merchandising of gravel, state:

A. The territory or area served by you.

B. The names and addresses of each competitor with respect thereto, and the territory served by said competitor.

C. The nature of any affiliation or relationship between you and said competitor. If contained in any written instrument, correspondence or document, set forth copies thereof or if oral, set forth the substance thereof, including the time and place, when and where made, and the persons present and participating on behalf of the respective parties.

D. For each year, the names of your 10 largest customers therefor, including the volume and price by item, as well as the total volume and price, and the place of delivery thereof, and what, if any, discounts or reductions were granted.

E. Your source of supply of said commodity, including the place, or places, of digging, processing, washing, classifying, or loading thereof.

10 A thru E. Interrogatory 9A thru E is repeated with respect to sand or grit rather than gravel.

11 A thru E. Interrogatory 9A thru E is repeated for ready-mix concrete (using gravel as an aggregate) rather than for gravel.

12. Have you individually, or with any of the defendants, or any other person, firm or corporation, granted any consideration, discount, allowance, rebate, or other consideration, or benefit, of any nature, directly or indirectly, or made any sale, agreement, contract, or supply of sand, grit, gravel, ready-mix concrete, or other commodity, based or conditioned upon any purchase, or use of any other business, commodity or service, sold or offered by you, or any of the

other defendants, including but not limited to, gravel and ready-mix concrete, ready-mix concrete with gravel as a constituent or aggregate, sand or grit and gravel, ready-mix concrete containing sand or grit and/or gravel as an aggregate, etc.? If so:

A. Set forth each occasion, including the parties involved, the nature thereof, and the amounts involved.

B. Set forth copies of any price list, price structures, formula, correspondence or other documents setting forth a combined price, or any such benefit, for the purchase of any one or more of said goods, commodities or services, together with any other of such goods, commodities or services, including but not limited to ready-mix concrete, together with gravel as an aggregate, ready-mix concrete with sand or grit and gravel as an aggregate.

C. State whether you have charged any price differential for ready-mix concrete containing gravel rather than crushed stone as an aggregate, or for

ready-mix concrete containing sand or grit produced from gravel as distinguished from that produced from crushed stone as an aggregate.

13. With respect to the claimed price increase dated February 6, 1968 to be effective April 1, 1968, state:

A. Was there any mutual agreement with respect thereto? If so, set forth a copy of said agreement if written, or the substance thereof if oral, including the time and place, when and where made, and the persons present and participating on behalf of the respective parties.

B. What was the prevailing pit price for each item comprehended thereby on said date? In this regard, identify each source of supply, location and pit price claimed to be in effect and prevailing and annex copies of any price lists, price structures, or price notices.

C. Did you give notice to any of plaintiffs at least 60 days prior to April

1, 1968 of any such price increase? If so, set forth a copy thereof if in writing, including the date, place and method, when, where and how given or transmitted.

D. The period February 6, 1968 to date, have you charged any price to any other person, firm or corporation, equal to or lower than prices set forth in said notice of February 6, 1968, giving full allowance to any discounts, rebates, quantity discounts, credits, reimbursements, adjustments, benefits, tie-ins or other benefits or things of value, whether tangible or intangible, or direct or indirect? If so, set forth the name of each said customer, the dates and nature of said purchases, including the amounts and quantities involved, and the reasons therefor.

12. Do you have, or claim to have, or do you, or will you rely upon any statement or admission by, or on behalf of any of the plaintiffs herein, or any letter, document, instrument, oral or written expression or statement, from, or

by them? If so, set forth a copy of each thereof if in writing, or the substance thereof if oral, including the time and place, when and where made, and the persons present and participating therein or thereat.

13. State if you rely on any facts, conduct, acts, omissions, statements, instruments, or other acts or omissions of, of any of the plaintiffs, or any one believed to be acting on their behalf, as any execuse, cancellation, waiver, nullification, delay, suspension, or other justification for your failure to carry out or perform any of the terms or conditions of any lease, agreement, deed, contract, arrangement or understanding between you and any of the plaintiffs. If so, set forth a copy thereof if in writing, or if not, the nature thereof, including the time and place, when and where the same occurred, and the persons present and participating therein.

Dated: Buffalo, New York
November 23, 1970.

RAICHLE, BANNING, WEISS & HALPERN

By_____
Arnold Weiss
A Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203

Plaintiffs' Notice of Depositions.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.; GEORGE C. FREY BATCHING PLANT, INC.; and HERBERT FREY and LOIS MUCK as Co-Executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

Civil Action
No. 1970-277

vs.

PINE HILL CONCRETE MIX CORP.; REGENT SAND & GRAVEL CORP.; LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL, and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, liquidators and receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation; and PFOHL BROTHERS, INC.,

Defendants.

PLAINTIFFS' NOTICE OF TAKING DEPOSITIONS

PLEASE TAKE NOTICE that each of the plaintiffs will take the depositions of each of the individual defendants, viz.: Ludwig F. Kahle, Joseph Pfohl, Paul M. Pfohl, and Fidelis H. Pfohl, as well as the depositions of each of the corporate defendants by Ludwig F. Kahle, president and treasurer, Carl E. Kahle, vice president, and Curt G. Kahle, secretary, and of each of its other officers, directors, employees, agents and/or representatives as have knowledge of the facts herein, before a Notary Public authorized to administer oaths, at the office of the undersigned, commencing at 10:00 A.M. on Tuesday, December

29, 1970, or immediately following the conclusion of defendants' depositions of plaintiffs scheduled to commence December 16, 1970 at 10:00 A.M., whichever is earlier. You are invited to attend and cross-examine.

PLEASE TAKE FURTHER NOTICE that each of the defendants is requested to produce at the taking of said depositions, the following books, papers and documents:

1. All corporate minute books, minutes and records of stockholders' and directors' meetings of the defendant corporations, or any affiliates thereof from January 1, 1949 to date.

2. All deeds, leases, contracts, agreements, correspondence, records and documents of every kind of the individual or corporate defendants, by, from, to, with, concerning each of the defendants and/or plaintiffs, or their agents, officers, representatives or affiliates, or any combination thereof, with respect to any of the facts or matters involved herein, including but not limited to the negotiation, execution, performance and/or breach of any agreement dated May 17, 1949, between George C. Frey and Pfohl Brothers, Inc., as well as all subsequent amendments, extensions, modifications or changes thereto from January 1, 1949, to date.

3. All annual and other financial statements, corporate and personal income tax returns, both federal and state, of the individual and corporate defendants, and of the late George C. Frey, deceased, from January 1, 1949 to date.

4. All financial statements, both annual and otherwise, and all corporate income tax returns, both federal and state, of any and all corporations owned or controlled by, or affiliated with any or all of the defendants from January 1, 1949 to date.

5. All correspondence, bills, invoices, price schedules, price lists, records and documents of every kind with respect to "purchasing, receiving, storing, producing, mixing, batching, soliciting, selling, distributing, delivering and installing sand, gravel, aggregates, cement, cement products, concrete and/or ready-mixed concrete, as well as materials and business generally related thereto" engaged in, by, any or all of the plaintiffs and/or defendants with each other and/or any and all of their customers and suppliers, from January 1, 1949 to date.

6. Copies of all agreements, contracts, correspondence, communications or memoranda by, to, concerning or between the parties, and their affiliates, and their respective officers, directors, employees, agents and/or representatives.

7. All books, papers, records and documents called for by plaintiffs' interrogatories to defendant dated November 23, 1970.

8. All other books, papers, records and documents having any relevance to, or bearing on the facts, matters and issues herein.

Dated: Buffalo, New York
December 9, 1970.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss
A Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203

TO: Charles J. McDonough, Esq.
McDonough, Boasberg, McDonough & Beltz
930 Walbridge Building
Buffalo, New York 14202
Attorneys for Defendants

Defendants' Objections to Plaintiffs' Interrogatories.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY and LOIS MUCK as co-executors
of the Estate of GEORGE C. FREY, deceased

Plaintiffs

-vs-

CIVIL No. 1970-277

PINE HILL CONCRETE MIX CORP.
REGENT SAND & GRAVEL CORP.
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL and FIDELIS H. PFOHL,
individually and as the controlling
and surviving Directors, Officers, Share-
holders, Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC., a
dissolved corporation, and
PFOHL BROTHERS, INC.

Defendants

The defendants make the following objections to the interrogatories served herein by the plaintiff on December 10, 1970:

1. The defendants object to the plaintiffs' "Instructions" (p. 1-3). There is no statutory authority for any such "Instructions" either in Federal Rule 33 or elsewhere in the Federal Rules with respect to the depositions and discovery (Fed. Rules 26-37).

Inasmuch as the "Instructions" are "deemed to be applicable to and incorporated in each interrogatory to each defendant" (p. 1), the defendants cannot properly answer any of the plaintiffs' interrogatories

until the court has passed on this objection.

2. However, in order to expedite the discovery procedures herein, the defendants also make the following specific objections to the following interrogatories:

Objection to Interrogatory No. 1(C) (p. 3):

The plaintiffs are not entitled to these records in answer to interrogatories. The proper procedure would appear to be a motion for discovery and inspection of relevant and material documents under Federal Rule 34.

Objection to Interrogatory No. 2 (p.4):

The defendants object to Interrogatory No. 2 in its entirety. The preparation and production of the information, documents and records therein demanded would be oppressive and unduly burdensome upon the defendants. The proper procedure would appear to be a motion for discovery and inspection under Rule 34, at which time the defendants will produce all relevant and material records and documents, and will give the plaintiffs a "reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."(Federal Rule 33(c)).

Defendants' Objections to Plaintiffs' Interrogatories.

Objection to Interrogatory No. 3 (p. 6).

The defendants object to Interrogatory No. 3 in its entirety. The preparation and production of the information, documents and records therein demanded would be oppressive and unduly burdensome upon the defendants. The proper procedure would appear to be a motion for discovery and inspection under Rule 34, at which time the defendants will produce all relevant and material records and documents, and will give the plaintiffs a "reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries." (Federal Rule 33(c)).

Objection to Interrogatory No. 4(B)(C)(D) & (E),(p. 8).

The defendants will answer the direct questions contained in Interrogatory No. 4, if the "Instructions" (p.1) are eliminated. However, with respect to the detailed information and documents demanded in Interrogatory No. 4 B,C,D&E, the defendants object on the same grounds stated above with reference to Interrogatories 2 and 3.

Objection to Interrogatory No. 5 (p. 9).

The defendants object to Interrogatory No. 5 in its entirety. The preparation and production of the information, documents and records therein demanded would be oppressive and unduly burdensome upon the defendants. The proper pro-

cedure would appear to be a motion for discovery and inspection under Rule 34, at which time the defendants will produce all relevant and material records and documents, and will give the plaintiffs a "reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries." (Federal Rule 33(c)).

Objection to Interrogatory No. 7 (p. 12).

The defendants will answer the direct questions contained in Interrogatory No. 7, if the "Instructions" (p. 1) are eliminated. However, with respect to the detailed information and documents demanded in Interrogatory No. 7, the defendants object on the same grounds stated above with reference to Interrogatories 2 and 3.

Objection to Interrogatory No. 8 (p. 16).

The defendants will answer the direct questions contained in Interrogatory No. 8, if the "Instructions" (p. 1) are eliminated. However, with respect to the detailed information and documents demanded in Interrogatory No. 8, the defendants object on the same grounds stated above with reference to Interrogatories 2 and 3. Defendants further object to Interrogatory 8(C) (p. 17) on the ground that the proper procedure is under Rule 34, if based on proper grounds.

Defendants' Objections to Plaintiffs' Interrogatories.

Objection to Interrogatories Nos. 9(D), 10(D) and 11(D).(p.20).

The defendants object to these interrogatories on the same grounds of objection stated with reference to Interrogatories 2, 3 and 5, above. The defendants further object to these interrogatories, on the ground that they would require the disclosure of trade secrets or other confidential commercial information (Rule 26(c)(7).

Objection to Interrogatory No. 12 (p. 21).

The defendants will answer the direct questions contained in Interrogatory No. 12, if the "Instructions" (p. 1) are eliminated. However, with respect to the detailed information and documents demanded in Interrogatory No. 12, the defendants object on the same grounds stated above with reference to Interrogatories 2 and 3.

Objection to Interrogatory No. 13 (p. 23).

The defendants will answer the direct questions contained in Interrogatory No. 13, if the "Instructions" (p. 1) are eliminated. However, with respect to the detailed information and documents demanded in Interrogatory No. 13, the defendants object on the same grounds stated above with reference to Interrogatories 2 and 3. Defendants also object to Interrogatory 13D, on the further ground that it would

require disclosure of trade secrets.

Objection to Interrogatory 14 (erroneously designated No. 12). (p. 24).

The defendants object to Interrogatory No. 14, on the ground that it is vague, ambiguous and too general in scope. The defendants also object to the production of documents under this interrogatory, on the same grounds previously stated with respect to the production of other documents and records of the defendants (Objections to Interrogatories 2, 3, 5,9).

Objection to Interrogatory 15 (erroneously designated No. 13 (p.25).

The defendants object to Interrogatory No. 15, on the ground that it is vague, ambiguous and too general in scope. The defendants also object to the production of documents under this interrogatory, on the same grounds previously stated with respect to the production of other documents and records of the defendants (Objections to Interrogatories 2, 3, 5, 9).

Dated: Buffalo, N.Y.
January 4, 1971

McDONOUGH BOASBERG McDONOUGH & BELTZ

by

CHARLES J. McDONOUGH
Attorneys for Defendants
Office and P. O. Address
930 Walbridge Building
Buffalo, New York

Plaintiffs' Motion to Compel Discovery.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased

Plaintiffs

vs.

CIVIL NO. 1970-277

MOTION FOR ORDER COMPELLING DISCOVERY.

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants

Plaintiffs move the Court for an Order as follows:

A. Compelling each of the defendants to answer such of plaintiffs' First Interrogatories dated November 23, 1970, as to which they have filed no Objections;

B. Overruling defendants' Objections dated January 4, 1971, to plaintiffs' First Interrogatories and compelling each of the defendants to answer each of said Interrogatories.

C. Compelling each of the defendants to appear and give his and/or its deposition at a date to be fixed by the Court, pursuant to plaintiffs' Notice of Taking Depositions, dated December 9, 1970, and to produce at that time all of the books, papers and documents set forth in said Notice; which said depositions plaintiffs have attempted to take on various dates, including December 16 and December 22, 1970, and January 13, 1971 but have been unable so to do because of the unavailability of defendants' counsel, Charles McDonough, Esq.;

D. Vacating and/or modifying this Court's Order dated September 15, 1970 as to which plaintiffs had no advance notice because plaintiffs' counsel, Arnold Weiss, Esq., was out of the city;

E. Establishing an immediate and definite schedule for discovery and directing defendants to secure substitute or additional counsel in the event that their counsel, Charles McDonough, Esq., is not available on any occasion; and

F. Granting such other and further relief as may be just and proper, including the costs

and expenses of this motion, pursuant to Rule 37(a)4.

Dated: Buffalo, New York
February 15, 1971

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss
A Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

TO: McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attention: Charles J. McDonough, Esq.
Attorneys for Defendants
930 Walbridge Building
Buffalo, New York 14202

PLEASE TAKE NOTICE that plaintiffs will bring the within motion on for a Hearing before this Court at the United States Court House, Niagara Square, Buffalo, New York, on February 26, 1971, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss
A Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

Plaintiffs' Second Interrogatories to Defendants.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.; GEORGE C. FREY BATCHING PLANT, INC.; and HERBERT FREY and LOIS MUCK as Co-Executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

Civil Action
No. 1970-277

PINE HILL CONCRETE MIX CORP.; REGENT SAND & GRAVEL CORP.; LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL, and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation; and PFOHL BROTHERS, INC.,

PLAINTIFFS' SECOND INTERROGATORIES TO DEFENDANTS.

Defendants.

INSTRUCTIONS FOR INTERROGATORIES TO DEFENDANTS

Plaintiffs hereby incorporate herein each of the instructions contained in plaintiffs' First Interrogatories to defendants.

Interrogatories propounded by plaintiffs to each defendant and to be answered separately by each defendant:

14. State whether defendants, or any of them, did ever directly or indirectly, make, or attempt to make, any offer, agreement, plan, contract, option, arrangement, partnership, combination, group, joint venture, corporation or other means

or device for the purchase, acquisition, management, use, sale, lease, control of any of the following companies, firms or businesses, or any of their customers, products, rights, output, property, equipment or assets:

A. Genesee Sand & Gravel Company;

B. Genesee Ready-Mix Concrete Company;

C. Buffalo Sand Co., Inc.;

D. Pfohl Bros., Inc.;

E. Lancaster Stone Company;

F. Joseph, Paul and Fidelis Pfohl d/b/a Pfohl Bros.;

G. Buffalo Crushed Stone Company Division of Houdaille Industries;

H. Federal Crushed Stone Company, now Division of Koppers Corporation;

I. Leonard Piechocki Farm;

J. Queen City Ready-Mix Concrete Company;

K. Meyer & Meyer;

L. Vero Ready-Mix Co.;

M. Blasdell Ready-Mix Co.;

N. Larry Paolini Ready-Mix Concrete;

O. Biscaro Ready-Mix Company a/k/a Depew Ready-Mix Company;

P. Quadico Trucking;

Q. Sterling Sand & Gravel Co.;

R. Jamison Road Pit;

S. Clarence Sand & Gravel;

T. Buffalo Perolite Company;

U. Any other ready-mix concrete company, business or interest;

V. Any other concrete, stone, crushed stone, or aggregate company or business;

W. Any other gravel, gravel pit, gravel source or similar aggregate, pit, land, property, source, company or busines; and

X. Any other similar or related property, business, right, material or source thereof.

15. For each of the companies, interests, sources, etc. mentioned in questions 14A thru X, or in any of the answers thereto state:

A. Whether or not any of the defendants did directly, or indirectly, acquire the same, or any right, title or interest therein or thereto.

B. The date thereof.

C. The purpose thereof.

D. The ratio of said ready-mix, crushed stone, gravel or other aggregate or commodity produced by said company, compared to the total production in said defendants' competitive area.

E. The price, terms and conditions thereof. In this connection, set forth copies of all contracts, documents or agreements relating thereto or effectuating the same.

F. The percentage of the market or source of supply of said ready-mix concrete, aggregate, gravel, crushed stone or other commodity controlled by defendants individually and jointly, before and after each said acquisition, etc. mentioned above.

G. As to each of said companies, businesses, or products, commodities or rights, state whether the same was operated by the defendants, or any of them, as an individual, entity or business, or whether the same was incorporated into or operated by or as part of another business or entity. If in the affirmative, state the name of such entity, the date thereof, and the terms and conditions thereof, including any written documents in connection therewith.

16. Set forth:

A. The names, locations and owners of each source of supply of sand, gravel, grit, crushed stone and aggregate for concrete in

the competitive area served by plaintiffs.

B. The names, locations and owners of each source of supply of sand, gravel, grit,. crushed stone and aggregate for concrete in the competitive area served by defendants.

C. In each case, set forth to the best of your knowledge the reserves of each of said sources listed above, both in years and in tons, based on current production.

D. The prices charged therefor by said sources and/or the price schedules therefor.

17. State the "prevailing pit prices" of gravel, grit and sand suitable for use as an aggregate and concrete charged by each company, firm or corporation producing and/or selling the same:

A. In the competitive area served by plaintiffs;

B. In the competitive area served by defendants.

18. Identify each adjustment, alteration, change, variation, deviation or discount from selling price, recognized,

utilized or engaged in by any of the defendants or plaintiffs with respect to:

A. Ready-mix concrete;

B. Sand or grit;

C. Crushed stone;

D. Gravel;

E. Any other aggregate suitable for use in concrete.

19. State the terms and conditions under which each of the following defendants sold sand, grit, gravel and/or crushed stone to any other person, firm or corporation, including any of the other defendants or any of the plaintiffs, or any competitors or third parties, including any credits, discounts, rebates, bonuses, free materials, reduced prices, or other allowances, adjustments, rebates of every kind and character, including but not specifically limited to the following companies:

A. Regent Sand & Gravel Corp. to Pine Hill Concrete Mix Corp. or vice versa;

B. Regent Sand & Gravel Corp. to any of plaintiffs;

C. Pine Hill Concrete Mix Corp. to any of plaintiffs;

D. Regent Sand & Gravel Corp. and/or Pine Hill Concrete Mix Corp. to any competitor of any of the plaintiffs or any of the defendants;

E. Any other person, firm or corporation whatsoever, including any defendant.

20. State:

A. The nature and amount of, as well as each of the factors which determine the amount, eligibility for, and applicability of any quantity discount, rebate, free merchandise, reduced price merchandise or other benefit, reward, tie-in, allowance, credit, adjustment, consideration which any of defendants ever allowed, awarded, credited or caused to, directly or indirectly benefit any customer, person, firm, corporation, including but not limited to any ready-mix concrete company.

B. The justification or reason for granting or making the same, in each case.

Plaintiffs' Second Interrogatories to Defendants.

21. State:

A. The quantity, types, dates and prices of sand, grit, gravel and/or crushed stone offered, sold or transferred by Regent Sand & Gravel Corp. to any of the defendants, or any other company or business owned or controlled by defendants during the period involved, including any other services or benefits such as delivery, discounts, rebates, adjustments, refunds or other considerations or benefits.

B. The quantity, types, dates and prices of sand, grit, gravel and/or crushed stone offered, sold or transferred by Regent Sand & Gravel Corp., or any of the other defendants, to any of the plaintiffs during the period involved, including any other services or benefits such as delivery, discounts, rebates, adjustments, refunds or other considerations or benefits.

C. The quantity, types, dates and prices of sand, grit, gravel and/or crushed stone offered, sold or transferred by Regent Sand & Gravel Corp., or any of the other defendants, to any other person, firm or corporation during the period involved, including any other services or benefits such as delivery, discounts, rebates, adjustments, refunds or other considerations or benefits.

Plaintiffs' Second Interrogatories to Defendants.

22. Set forth:

A. The prices charged to defendant Pine Hill, or the net cost to Pine Hill as reflected on its books and income tax returns, of sand, grit, gravel and/or crushed stone, utilized or suitable for use by it, or others, in the manufacture of concrete.

B. The prices charged by defendant Regent Sand & Gravel Corp., or the net increase to Regent as reflected on its books and income tax returns, of sand, grit, gravel and/or crushed stone, utilized or suitable for use in the manufacture of concrete.

23. If the testimony given by defendants in the action of Pine Hill Concrete vs. Frey presently pending in Supreme Court, Erie County, is in any respect not completely true and correct:

A. Set forth any changes in any of said testimony, including the page, line and volume thereof which is necessary to correct or modify the same so as to make the same in all respects true and correct;

B. State specifically the reason for each change which any defendant claims is necessary to make said deposition true and correct.

24. Set forth for the defendant Pine Hill for each year from 1948 to date the following information:

Plaintiffs' Second Interrogatories to Defendants.

A. The retail list price per cubic yard of a 5-bag mix with aggregate consisting of 50% grit, 25% number 1 gravel, and 25% number 2 gravel;

B. The net cost to Pine Hill of aggregate per cubic yard of said mix.

C. The percentage or ratio of said net cost of aggregate to Pine Hill expressed as a percentage of said list price;

D., E. and F. Same as A., B. and C. but with respect to contractors' net price;

G., H. and I. Same as A., B. and C. but for prices quoted for typical specific major jobs.

25. With respect to each job bid on, whether or not secured, or awarded to defendant Pine Hill during the period 1969 to date, state:

A. The price bid per yard of concrete;

B. The composition of said concrete with respect to bags of cement and percentages of aggregate;

C. The computed cost or expense to Pine Hill or Regent of the aggregate computed to be required for each yard of said concrete;

D. The net actual cost to Pine Hill and/or Regent for each type of aggregate which was actually utilized per yard of said concrete on each job actually secured or awarded to defendart Pine Hill during said period.

E. The ratio of aggregate cost expressed as a percentage of concrete price per yard for each of said jobs bid, secured or awarded during said period.

26. State:

A. Whether aggregate cost, expressed as a percentage of concrete selling price per yard is generally, traditionally, customarily or usually a specific or fixed percentage or whether it fell within a range or band of percentages during the period 1948 to date.

B. For each year, set forth said percentage or range thereof for each type

* * *

Plaintiffs' Motion to Compel Discovery.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased

Plaintiffs

CIVIL NO. 1970-277

vs.

MOTION FOR ORDER STRIKING PLEADINGS AND GRANTING JUDGMENT.

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants

Plaintiffs move the Court for an order as follows:

A. Striking defendants' answer and pleadings for failure to comply with the order of this Court regarding the discovery procedure, and for failing to grant or proceed with discovery heretofore noticed and scheduled;

B. Alternatively, for an order compelling defendants to answer plaintiffs' first and second interrogatories, and to forthwith appear to have their deposition taken, pursuant to

plaintiffs' notices thereof, and directing defendants to furnish additional or alternate counsel therefor in the event their present counsel is unavailable by reason of other engagements.

C. Bringing on for argument on the return date of this motion plaintiffs' adjourned motion dated February 15, 1971 for an order compelling discovery; and

D. Granting such other and further relief as may be just and proper, including the costs and expenses of this motion, pursuant to Rule 37(a).

This motion is based upon plaintiffs' motion dated February 15, 1971 for an order compelling discovery which was argued before this Court on Friday, March 5, 1971, and the order of the Court then and there granted upon stipulation of counsel for all parties that defendants would: (1) serve their answer to plaintiffs' interrogatories by Monday, March 12, 1971; (2) take plaintiffs' depositions pursuant to defendants' notices thereof, commencing 10:00 A.M. Thursday, March 15, 1971; and (3) plaintiffs' depositions of defendants would commence one month thereafter; and upon defendants' failure to answer said interrogatories and refusal to take plaintiffs' depositions.

Plaintiffs' Motion to Compel Discovery.

PLEASE TAKE NOTICE that plaintiffs will require oral testimony of the defendants upon the argument of this motion, and requewt the personal appearance of the defendants Ludwig F. Kahle, as well as the Chief Executive Officer of each of defendant corporations.

Dated: Buffalo, New York
April 16, 1971.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

TO: McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attention: Charles J. McDonough, Esq.
Attorneys for Defendants
930 Walbridge Building
Buffalo, New York 14202

PLEASE TAKE NOTICE that plaintiffs will bring the within motion on for a Hearing before this Court at the United States Court House, Niagara Square, Buffalo, New York, on April 30, 1971 at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, A Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

Plaintiffs' Motion to Compel Answers to Interrogatories.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased

Plaintiffs

vs.

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants

CIVIL NO. 1970-277

MOTION TO COMPEL ANSWERS TO INTERROGATORIES

Plaintiffs move the Court for an order:

A. Overruling defendants' objections dated March 30, 1971 to Plaintiffs' Second Interrogatories dated March 4, 1971;

B. Compelling defendants, and each of them, to answer plaintiffs' Second Interrogatories.

Dated: Buffalo, New York
April 27, 1971.

Order of May 7, 1971.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased

Plaintiffs

CIVIL NO. 1970-277

vs.

ORDER

PINE HILL CONCRETE MIX CORP. [illegible]GENT SAND & GRAVEL CORP. [illegible]DWIG F. KAHLE, JOSEPH PFOHL, [illegible]AUL M. PFOHL and FIDELIS H. PFO[illegible], individually and as the cont[illegible]olling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, [illegible]NC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants

Plaintiffs having moved the Court by motion dated February 15, 1971 for an order compelling the defendants to proceed with discovery herein and granting such other and further relief as may be just and proper; and

Said motion having come on to be heard before this Court on March 5, 1971, and after hearing ARNOLD WEISS, ESQ., attorney for plaintiffs, in support of said motion, and CHARLES McDONOUGH, ESQ., attorney for defendants, in opposition thereto, and after due deliberation and consideration, this Court having ordered the parties to comply with a Discovery Time Table as follows:

Order of May 7, 1971.

April 12, 1971	Defendants to serve answers to Plaintiffs' interrogatories;
April 19, 1971	Defendants' depositions of Plaintiffs to commence;
May 17, 1971	Plaintiffs' depositions of Defendants to commence;

and

It appearing to this Court that the defendants have failed to comply with said deposition schedule, and plaintiffs having moved this Court by motions dated April 16, 1971, and April 27, 1971 to strike defendants' pleadings, furnish additional or alternate counsel, and/or to proceed with the discovery and/or furnish additional or substitute counsel, and such other and further relief as may be just and proper in the premises; and

Said motion dated February 15, 1971 having come on for additional hearing and said motions dated April 16 and April 27, 1971 having come on for a joint hearing beforethis Court on May 7, 1971; and after hearing ARNOLD WEISS, ESQ., attorney for plaintiffs, in support thereof, and ROBERT KAISER, ESQ. of the office of Charles McDonough, attorney for defendants, in opposition thereto; and

Upon hearing the testimony of Louis Muck, Secretary and Treasurer of the plaintiff corporations and one of the individual plaintiffs herein, in support of said motions; and

It appearing that it is in the interests of justice that an order be granted herein restoring the status quo which

existed prior to the institution of this litigation, and preserving the same pending the outcome of this litigation, and it further appearing that the interests of justice will be served by progressing this litigation and the pretrial proceedings therein; and after due deliberation and consideration and hearing the parties herein, it is

ORDERED, that effective immediately, upon service of a copy of this order, and continuing during the pendency of this litigation or the further order of this Court, the defendants be and they are hereby directed to sell and supply to plaintiffs, plaintiffs' requirements of concrete grit and concrete gravel for use in and delivered to plaintiffs' concrete batching and ready-mixed plant and business, and to be delivered without extra charge into the bins of said plants, on Peppermint Road in the Town of Lancaster, Erie County, New York, and to be of the same quality, and upon the same prices, terms, conditions and discounts as defendants sold and delivered to plaintiffs during the calendar year 1967; or the current prevailing pit prices from time to time accorded the defendants Pin [illegible] Concrete Mix Corp or Regent Sand & Gravel Corp., whic[illegible] price is lower; and it is further

ORDERED, that defendants shall not during the pendency of this litigation discriminate in any way against the plaintiffs, or any of them, in the sale or supply of said concrete grit or concrete gravel, or in the conduct of their ready-mixed businesses; and it is further

Order of May 7, 1971.

ORDERED, that any reduction in price of said grit and gravel accorded to plaintiffs by defendants by reason of this order shall abide the event and shall be payable by plaintiffs to defendants in the event that plaintiffs shall not prevail in this litigation; and it is further

ORDERED, that the following Time Table is hereby established for the conduct of the pretrial proceedings herein:

June 7, 1971	Defendants to answer Plaintiffs' First and Second Interrogatories;
July 6, 1971	Defendants to commence their depositions of Plaintiffs;
August 9, 1971	Plaintiffs to commence their depositions of Defendants;

and it is further

ORDERED, that any party herein may apply to this Court at any time for any further or additional relief as may be just and proper to carry out the intent of this Order.

Dated: Buffalo, New York
May 7, 1971.

John T. Curtin
United States District Judge

ATTEST: A [illegible]
JOHN [illegible]
By [illegible]
Deputy Clerk

Original filed May 7, 1971

Affidavit and Order to Show Cause for an Order
Vacating or Modifying Order of May 7, 1971.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased

Plaintiffs Civil No. 1970-277

-vs-

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL ans FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporatinn, and PFOHL BROTHERS, INC.

Defendants

Upon reading and filing the annexed affidavit of CHARLES J. McDONOUGH, attorney for the defendants, sworn to May 10, 1971, the order of this court entered May 7, 1971, the pleadings herein, and all other proceedings heretofore had herein, it is hereby

ORDERED, that the plaintiffs and their attorneys show cause at a Special Term of this Court to be held in the United States Court House in the City of Buffalo, New York, on May 14, 1971, at 10 A.M., or as soon thereafter as counsel can be heard, why a further order should not be made and

JFC

Affidavit and Order to Show Cause for an Order
Vacating or Modifying Order of May 7, 1971.

entered herein, vacating or modifying the aforesaid order of May 7, 1971, and granting the defendants such other and further relief herein as may be just and proper.

And sufficient cause appearing therefor, it is further

ORDERED, that further proceedings under, and enforcement of said prior order of May 7, 1971, be and the same hereby is stayed, pending determination of this order to show cause.

And sufficient reason therefor, let service of a copy of this order to show cause and the affidavit upon the attorneys for the plaintiffs on or before May 12, 1971, be deemed sufficient service herein.

- attorney for Plaintiff shall prepare answering affidavit and file on 5/14/71

/s/ John T. Curtin at 11 A.M.

UNITED STATES DISTRICT JUDGE.

Dated: May 11, 1971

Affidavit and Order to Show Cause for an Order
Vacating or Modifying Order of May 7, 1971.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY and LOIS MUCK, as co-executors
of the Estate of GEORGE C. FREY, deceased

Plaintiffs

-vs-

PINE HILL CONCRETE MIX CORP.
REGENT SAND & GRAVEL CORP.
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
asset of PFOHL BROTHERS, INC.

Defendants

STATE OF NEW YORK)
COUNTY OF ERIE) ss
CITY OF BUFFALO)

CHARLES J. McDONOUGH, being duly sworn, deposes and says that he is the attorney for the defendants herein. This affidavit is made in support of a motion to vacate, modify and resettle the order of this court made and entered on May 7, 1971, particularly the first three ordering paragraphs thereof.

The plaintiffs' first and chief cause of action, alleged in the complaint, is for violation of the Sherman Anti-Trust Act and the Clayton Act (15 USCA, §1 et seq). The plaintiffs claim that commencing May 17, 1949, and continuing up

to the present date, all of the defendants have conspired to monopolize and restrain trade and commerce with respect to the gravel and ready-mix concrete business in Western New York, and to interfere with and destroy the ability of the plaintiffs to compete in said business (Complaint, Paragraphs 22 thru 28).

The plaintiffs claim damages of "not less than $250,000.00", and demand treble damages, as well as punitive damages (Complaint, Paragraph 29).

The plaintiffs also demand injunctive relief, and a declaratory judgment that title to the premises conveyed in 1949 has revertedto the plaintiffs.

The defendants' answer denies the material allegations of the plaintiffs' complaint, and sets up several affirmative defenses, including the statute of limitations, and challenging the jurisdiction of the court with respect to the person of the defendant PAUL M. PFOHL, and the jurisdiction of the court with respect to the subject matter of the second, third, fourth, fifth and sixth claims asserted in the complaint.

Deponent begs leave to incorporate by reference, in this affidavit, the allegations of the complaint and answer, the originals of which will be before the court upon argument of this motion.

Affidavit and Order to Show Cause for an Order Vacating or Modifying Order of May 7, 1971.

On information and belief, on or about May 17, 1949, and for a valuable consideration, George C. Frey conveyed to Pfohl Brothers, Inc. certain real property in the Town of Lancaster, New York, which contained deposits of sand, grit and gravel. Pfohl Brothers, Inc. agreed to lease a portion of said premises to George C. Frey, including a concrete batching plant, and to sell and deliver to Frey sand, grit and gravel for use in Frey's batching plant. This agreement was to run for 15 years, and contained certain termination and renewal options, which are in dispute by the parties hereto.

The complaint further alleges a continuing conspiracy, on the part of all of the defendants, from May 17, 1949, up to the present time, to monopolize and restrain trade and commerce in the gravel and ready-mixed concrete business, and to injure and destroy the competitive status of the plaintiffs in said business. The complaint alleges many actions upon the part of the defendants, from 1949 to date, in violation of the agreement of May 17, 1949, in controlling the price of gravel to the plaintiffs, and in otherwise monopolizing and restraining and injuring the plaintiffs and their business; all in an attempt to monopolize the business for the benefit of the defendants (Complaint, Paragraphs 22 thru 28).

All of these allegations are denied by the answer herein.

It is important to note that although the alleged breach of the 1949 agreement occurred on February 6, 1968 (Complaint, Paragraph 27), the plaintiffs waited two and one half years, until June 15, 1970, to institute this action.

Deponent is Chairman of the Fourth Department Regional Committee of the New York State Fair-Trial Free-Press Conference. On May 7, 1971, deponent was required to attend an important meeting of the Conference in New York City, called by the Hon. Stanley H. Fuld, Chief Judge of the New York State Court of Appeals, who is State Chairman of the Conference.

On both May 5 and May 6, 1971, deponent called the office of Mr. Arnold Weiss of counsel for the plaintiffs, to advise him of the necessity of deponent's presence in New York City on May 7 and to advise him that it would be necessary for deponent to request an adjournment of the pending motion. Mr. Weiss was not in his office on either occasion. On both occasions, deponent requested that Mr. Weiss return the call. On neither date did Mr. Weiss return deponent's call. Deponent had to take a 7 A.M. plane for New York City on May 7.

When deponent was unable to reach Mr. Weiss, he asked Mr. Robert Kaiser of deponent's office to appear and request a further adjournment of the motion. Upon deponent's return from New York, and on Saturday morning, May 8, deponent saw a copy of the order of May 7, 1971, on his desk.

No such drastic interim relief as that granted the plaintiffs in the first three ordering paragraphs of the order of May 7, was requested in the plaintiffs' notice of motion. If the plaintiffs could wait two and one half years to institute this action, a short further delay in the taking of the depositions and answering of the interrogatories, which constituted the entire subject matter of the motion as made, would not have made the slightest difference in the status of the parties hereto.

The defendants have in good faith denied the allegations of the plaintiffs' complaint and will, of course, have an opportunity to meet the plaintiffs' charges upon trial of the action.

The plaintiffs have been actively engaged in business between 1968 and the present time, without the benefit of any help or further delivery of concrete grit and concrete gravel by the defendants.

The order of May 7, 1971, as presently drafted, in effect compels the defendant PINE HILL CONCRETE MIX CORP. to reinstate the terms and provisions of a contract pending trial of an action, one of the important issues of which, is whether or not the defendants did in fact breach the contract, or whether the plaintiffs themselves breached the contract, or whether the contract was ever extended according to its terms.

Affidavit and Order to Show Cause for an Order
Vacating or Modifying Order of May 7, 1971.

Deponent makes no claim with respect to the time table for the interrogatories or depositions, as set up in the last ordering paragraph of the order. Deponent submits, however, that to impose the conditions contained in the earlier ordering paragraph upon the defendants, would constitute an injust, inequitable and undeserved penalty upon the defendants. These paragraphs should be deleted from the order.

No previous application has been made for the relief sought herein.

Deponent therefore prays that an order enter herein vacating in their entirety the first three ordering paragraphs of the order of May 7; or in the alternative, modifying the said order in such respects as to the court may be just and proper, and granting the defendants such other and further relief herein as may be just and proper.

CHARLES J. McDONOUGH

Sworn to before me this 10th
day of May 1971

ROBERT BOASBERG

ROBERT BOASBERG
Notary Public State of New York
Qualified in Erie County
My Commission Expires 3/30/73

Plaintifts' Cross-Motion to Hold Defendants in Contempts.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

Civil No. 1970-277

vs.

CROSS-MOTION

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

Upon the annexed affidavits of Herbert G. Frey and Arnold Weiss sworn to May 13, 1971, and plaintiffs' motions dated February 15, April 16 and April 27, 1971, and the proceedings before this Court on the return day of said motions, namely: March 5 and May 7, 1971, upon all of the pleadings and proceedings heretofore had and taken herein, and on the order to show cause herein granted May 11, 1971, and the affidavit of Charles J. McDonough sworn to May 10, 1971 in support thereof, plaintiffs will move this Court at the return date of said order to show cause on May 14, 1971 at 11:00 A.M. for an order adjudging and

holding defendants, and each of them, in contempt of this Court, and in contempt of said order of this Court dated May 7, 1971 and granting such other and further relief as may be just and proper.

Dated: Buffalo, New York

May 13, 1971.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

TO: McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attention: CHARLES J. McDONOUGH, ESQ.
Attorneys for Defendants
930 Walbridge Building
Buffalo, New York 14202

Supporting Affidavit of Herbert G. Frey.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

Civil No. 1970-277

vs.

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

STATE OF NEW YORK:
COUNTY OF E R I E: ss
CITY OF BUFFALO:

HERBERT G. FREY, being duly sworn, deposes and says:

1. I am President of the plaintiff corporations George C. Frey Ready-Mixed Concrete, Inc. and George C. Frey Batching Plant, Inc., and one of the co-executors of the Estate of my deceased father George C. Frey who was the founder of said corporations and their ready-mixed concrete business.

Supporting Affidavit of Herbert G. Frey.

2. I have been President of the plaintiff corporations for approximately 4 years and prior thereto I was Vice President which position I held for approximately 18 years.

3. I am the General Manager of the ready-mixed businesses of the plaintiff corporations and am in full active and daily charge thereof and familiar with the circumstances thereof.

4. From 1949 thru 1968, we purchased all of our requirements of gravel from the defendants Pfohl pursuant to a 30-year agreement dated May 17, 1949 under which we sold Pfohl a gravel plant and premises including the property on which our batching plant was located in the Town of Lancaster; and defendants Pfohl in turn agreed to supply our batching plant with our requirements of concrete grit and gravel as needed, at a special price to be mutually agreed upon between us and to be then subject to a 20% discount plus a 2% cash discount, or a total discount of 21.6%, all delivered and placed in our hoppers.

5. The purpose and intent of this agreement was to give us an assured supply of gravel for our batching plant for a period of 30 years at a low price which would enable us to effectively compete with the other ready-mixed concrete companies in the area even though we did not have a gravel processing plant of our own.

Supporting Affidavit of Herbert G. Frey.

6. The defendant Pfohl supplied us with our requirements of gravel in accordance with the contract from 1949 thru 1957 when they sold to the defendant Pine Hill. Thereafter defendant Pine Hill sold to the defendant Regent Sand & Gravel Corp. (the date of this sale is a controverted and highly questionable date for the following reasons: Although Pine Hill purchased the Pfohl business on August 1, 1957, and the deed from Pfohl to Pine Hill was dated August 31, 1957, approximately 12 years later, said defendant Pine Hill purported to record deeds on February 11 and May 1, 1969 which were ostensibly dated August 31, 1957 and purported to reflect very belatedly some type of a conveyance from Pfohl to defendant Regent).

7. When Pfohl sold to Pine Hill in 1957, they not only sold Pine Hill which is our principal competitor, the land on which our batching plant sits but also said gravel processing plant which we previously sold to Pfohl in 1949. Additionally, however, Pfohl also sold to Pine Hill in 1957 all of Pfohl gravel lands in this area which constitute, to deponent's best available knowledge, almost all of the gravel sources in this area. Deponent desires to call the Court's attention to the fact that these gravel sources which Pfohl sold to Pine Hill in 1957 were to a large extent acquired by Pfohl with the aid and help of plaintiffs and my father who down through the years worked together with Pfohl to locate, acquire and finance these gravel sources.

Supporting Affidavit of Herbert G. Frey.

8. When Pfohl Brothers sold to Pine Hill, we were paying Pfohl a price of $2.00 per ton for the concrete grit and gravel. When defendant Pine Hill purchased the gravel business from Pfohl, we agreed in 1958 to pay Pine Hill a price of $2.20 per ton for the concrete grit and $2.40 per ton for the gravel, subject to said discounts of 20% plus 2%, and delivered to our hoppers at our batching plant, all as required by our agreement of May 17, 1949, which agreement Pine Hill assumed and undertook to carry out.

9. From 1958 thru the beginning of 1968, Pine Hill sold us our requirements of concrete grit and gravel at said price of $2.20 and $2.40 per ton respectively, and accorded us the discounts and made the deliveries required by the agreement of May 17, 1949.

10. However, on February 6, 1968, Pine Hill unilaterally and arbitrarily, and without any notice to us, purported to increase the price of concrete grit of $1.00 per ton or 45%, to $3.20 a ton, and the price of gravel 10¢ per ton. When we learned of this improper price increase, we protested but Pine Hill ignored our protests. We thereupon refused to pay the increased price and Pine Hill, after making numerous demands, finally in January, 1969, refused to sell us any further concrete grit or gravel unless we paid the increased price which for the year 1968 amounted to approximately $40,000.00 extra.

Supporting Affidavit of Herbert G. Frey.

11. My father made numerous attempts to meet with defendant Kahle and on March 27, 1968, and May 9, 1968 sent letters to defendant Pine Hill requesting a meeting with the defendant Kahle (copies of said correspondence are available and will be produced). My father also made numerous oral attempts to discuss this matter with the defendant Kahle. However, defendant Kahle at all times refused to meet with my father.

12. In January, 1969, after defendants' refusal to deliver said gravel, my sister Lois Muck, Secretary-Treasurer of our companies, wrote defendant Pine Hill that we would be compelled to purchase our gravel requirements elsewhere and would hold them for any damages which would follow.

13. Defendants also took the position that they would not honor the provision of the agreement requiring them to deliver the gravel to our hoppers but would charge us extra therefor. This could add approximately 15¢ to 25¢ per ton for delivery to the already increased prices.

14. Defendants also refused to accord us the agreed discount of 20%.

15. Deponent wishes to call to the Court's attention the significance of the fact that whereas defendant Pine Hill raised the gravel price only 10¢ per ton, it raised the concrete grit prices a $1.00 a ton. Concrete grit is a necessary ingredient of concrete. By raising this price by 45% or $1.00 per ton,

defendants made it impossible for any other concrete producer to utilize defendant's gravel or grit and compete either with defendants or any other concrete producer in the area.

16. It is a fair inference that defendants were attempting to foreclose the market to everyone else by this major price increase on a single necessary aggregate component of concrete.

17. Thereafter in 1969 and 1970 and to date, we have been forced to procure our gravel from sources in Alexander, New York (approximately 25 miles from our batching plant) and from Franklinville, New York (approximately 35 miles from our batching plant), or from Gowanda, New York (approximately 45 miles from our batching plant).

18. Although the price of grit and gravel at said sources is a reasonable prevailing pit price and a fair market price, the cost of trucking said gravel to our batching plant is greater than the cost of the gravel.

19. We have also been forced to resort to stockpiling, rental of equipment and expenditure of considerable sums of money to enable us to operate with such long-distance gravel sources. As a result, the price that we have been forced to pay for concrete grit and gravel is greatly in excess of other prevailing pit price in the Buffalo area and substantially in excess of the price which Pine Hill charged us in 1967.

Supporting Affidavit of Herbert G. Frey.

20. Upon information and belief, the defendants provide gravel to defendant Pine Hill at a much lower price and give it a competitive advantage.

21. As a result, we are paying a gravel price substantially in excess of that paid by Pine Hill and do not have the flexibility and availability that Pine Hill has because of our remote sources.

22. These actions by Pine Hill and the other defendants have caused us substantial losses. In the year 1968, if we were to give effect to the $40,000.00 additional gravel charge sought by defendant Pine Hill, we would have lost a substantial sum of money. Since January, 1969, when we were forced to acquire our gravel from Alexander, New York, Franklinville, New York, and Gowanda, New York, we sustained a total loss of approximately $200,000.00.

23. In addition, we have lost substantial business and are unable to compete with defendant Pine Hill, and particularly on large contracts. We have bid on many large contracts in the past 2 years with Pine Hill and Pine Hill has almost always underbid us by a substantial amount and obtained the contract. I attribute this ability of Pine Hill to underbid us to the lower price which they pay for gravel and the exorbitant price which we must pay.

Supporting Affidavit of Herbert G. Frey.

24. Upon information and belief, in addition, defendant Pine Hill has improperly given rebates, gratuities and made tie-ins in order to obtain business by giving free fill, or selling the same at lower than fair market prices, to contractors on major contracts in return for their concrete business. Specifically, when our salesmen attempted to sell concrete to contractors at the new Eastern Hills Mall at Main and Transit in the Town of Clarence, they were universally told that they could not sell concrete there because everyone was forced to buy the concrete from defendant Pine Hill because Pine Hill had provided the fill free.

25. Perhaps, defendants' predatory practices and monopolistic intent towards plaintiffs and the ready-mixed concrete market can be fully understood in the light of the fact that they unabashadly went out to Alexander, New York and acquired the gravel lands next to the largest excavation at our Alexander gravel source and thus limited us even in this remote source. This Alexander gravel pit in question furnished the gravel for our West Seneca, New York ready-mixed batching plant, which plant the defendants have always declined to supply with gravel even though comprehended by the agreement of May 17, 1949.

26. During the present year, plaintiffs continue to suffer from the wrongful actions of the defendants and contemplate that they will again lose a substantial sum of money this year. Defendants' underbidding conduct has been most particularly aggravated and noticeable this year.

Supporting Affidavit of Herbert G. Frey.

27. We have been unable to secure any major contract put out for bid this year. Whereas, defendant Pine Hill has been extremely successful in obtaining the major contracts.

28. The results of defendants' conduct can be illustrated by the decrease which we have suffered in business. Based on my estimate of our competitors' business, it appears to me that the following chart illustrates the market positions in 1965 and 1971:

PRODUCER	1965	1971
Frey	33%	25%
Pine Hill	33%	50%
All others	33%	25%

29. In the evening of May 7, 1971, the date of this Court's order, (directing defendants to sell us gravel at the previously agreed upon prices) we sent a telegram to defendant Pine Hill and defendant Regent as follows:

MAY 7, 1971 TELEGRAM

"PURSUANT TO US DISTRICT COURT ORDER MAY 7TH 1971 PLEASE DELIVER TO US AT OUR PEPPERMINT ROAD PLANT OUR REQUIREMENT OF CONCRETE GRIT AND CONCRETE GRAVEL KEEPING OUR HOPPERS FULL AT ALL TIMES, AND BILL US ACCORDINGLY AS YOU HAVE PREVIOUSLY DONE. PLEASE COMMENCE DELIVERIES AT 1 PM MONDAY MAY 10TH 1971.
GEORGE C. FREY BATCHING PLANT INC.
HERBERT FREY PRES"

Supporting Affidavit of Herbert G. Frey.

30. However, defendants did not comply with said Court order, did not respond to said telegram and did not deliver any gravel to our hoppers on Monday, May 10, 1971.

31. Accordingly, on Monday evening, May 10, 1971, we sent a further telegram to defendant Pine Hill and defendant Regent as follows:

MAY 10, 1971 TELEGRAM

"PLEASE INFORM US IMMEDIATELY WHEN YOU
INTEND TO COMMENCE SUPPLY OUR REQUIREMENTS
OF CONCRETE GRIT AND CONCRETE GRAVEL AS
REQUESTED BY PREVIOUS TELEGRAM PURSUANT
TO COURT ORDER.
GEORGE C FREY BATCHING PLANT INC
HERBERT FREY, PRESIDENT."

32. Defendants did not deliver any gravel to our hoppers on Tuesday, May 11, Wednesday, May 12, or Thursday, May 13, and have not responded to either of said telegrams. We have secured confirmation of delivery of said telegrams from Western Union.

Herbert Frey Pres.
George C. Frey

Sworn to before me this 13th
day of May, 1971.

Arnold Weiss

ARNOLD WEISS
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1972

Supporting Affidavit of Arnold Weiss.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased

Plaintiffs,

Civil No. 1970-277

vs.

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

STATE OF NEW YORK:
COUNTY OF E R I E: ss
CITY OF BUFFALO:

ARNOLD WEISS, being duly sworn, deposes and says:

1. I am an attorney-at-law duly admitted to practice before this Court, and a member of the Firm of Raichle, Banning, Weiss & Halpern, attorneys for plaintiffs herein.

2. Deponent makes this motion in opposition to defendants' application dated May 11, 1971, and the affidavit in support thereof of Charles J. McDonough sworn to May 10, 1971.

* * *

Supporting Affidavit of Arnold Weiss.

April 12, 1971	Defendants to answer plaintiffs' first interrogatories;
April 19, 1971	Defendants' depositions of plaintiffs;
May 17, 1971	Plaintiffs' depositions of defendants

(Transcript pp. 22-3).

26. Defendants have failed to comply with said Time Table in that they failed to serve their answers to plaintiffs' first interrogatories and failed to appear and proceed with their depositions of plaintiffs. Again the stated reason was the unavailability of defendants' counsel Charles McDonough, Esq.

27. In the meantime, plaintiffs have served their second interrogatories dated February 24, 1971 and defendants had served objections dated March 30, 1971 to some of said interrogatories but no answers to any of said interrogatories.

28. On April 16, 1971 the plaintiffs moved this Court for an order inter alia striking defendants' answer, or alternatively bringing on for argument plaintiffs' aforesaid motion of February 17, 1971, and granting such other and further relief as may be just and proper. Said motion of April 16, 1971 was made returnable on April 30, 1971 but defendants' counsel was again unavailable and said motion was adjourned to May 7, 1971 by mutual consent.

Supporting Affidavit of Arnold Weiss.

29. On April 27, 1971 plaintiffs moved this Court for an order, also returnable April 30, 1971, and adjourned by mutual consent to May 7, 1971 overruling defendants' objections to plaintiffs' second interrogatories.

30. On May 5 or May 6, 1971 the office of Charles McDonough telephoned deponent's office and stated that he would not be available on the return day of said 3 motions, namely May 7, 1971, and requested an adjournment. Deponent was engaged in other matters out of the office and informed his secretary to inform Mr. McDonough's office that no further adjournments could be granted and that the motions would continue to be returnable on May 7, 1971. Deponent has been informed by his secretary that she so informed Mr. McDonough's office.

31. On May 7, 1971 deponent appeared in Court with an officer of his clients', prepared to make proof of the dire economic straits in which plaintiffs had been placed by reason of defendants' actions. Mr. McDonough did not appear but instead Robert B. Kaiser, Esq. of his office appeared. Deponent called Mrs. Lois Muck, Secretary-Treasurer of the corporate plaintiffs, and examined her concerning the plaintiffs' said financial distress. Mrs. Muck was cross-examined by Mr. Kaiser.

32. Defendants' counsel apparently now contends that the Court did not have the power to grant the order of May 7, 1971. In this regard, defendants' counsel is unaware that the Court has broad powers under Rule 37 which allows the Court to

impose powerful sanctions for failure to "provide or permit discovery" including: (a) take as established the facts in question (FRCP 37(b)(2)(A); (b) refuse to allow the disobedient party to oppose designated claims or to introduce certain evidence (FRCP 37(b)(2)(B); (c) strike out any pleadings or parts thereof, or even rendering a judgment by default against the disobedient party (FRCP 37(b)(2,(C), or; (d) hold the party in contempt of Court (FRCP 37(b)(2)(D).

33. Defendants' counsel fails to note that plaintiffs' motion dated April 16, 1971 moves the Court for an order "striking defendants' answer and pleadings for failure to comply with the order of this Court regarding the discovery procedure". Surely, this is the most summary and comprehen ve relief which could be granted and which would encompass any lesser relief including the limited and provisional granted, pendente lite by the order of May 7, 1971 which sought to preserve the status quo which existed prior to the time that defendants allegedly breached their agreement with plaintiffs and discriminated against plaintiffs in the price of gravel.

34. Plaintiffs and plaintiffs' counsel are ready and will continue to be ready to progress this matter and proceed forthwith with discovery on short reasonable notice from defendants' counsel.

* * *

Defendants' Supplemental Supporting Affidavit
of Norman M. Moran.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY and LOIS MUCK as Co-Executors
of the Estate of GEROGE C. FREY, Deceased

Plaintiffs

vs. Civil Action No. 1970-277

SUPPLEMENTAL SUPPORTING AFFIDAVIT

PINE HILL CONCRETE MIX CORP.
REGENT SAND & GRAVEL, CORP.
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL, and FIDELIS H.
PFOHL, Individually and as the
Controlling and Surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC., a
Dissolved Corporation and
PFOHL BROTHERS, INC.

Defendants

* *

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

NORMAN M. MORAN, being duly sworn, deposes and says:

I reside at No. 244 Callodine Avenue in the Town of Amherst, New York. I am Controller of the defendant PINE HILL CONCRETE MIX CORPORATION and REGENT SAND & GRAVEL CORPORATION, and have been for the past ten years.

Defendants' Supplemental Supporting Affidavit
of Norman M. Moran.

I have read the order of May 7, 1971, and the testimony of Mrs. Lois Muck, Secretary and Treasurer of the plaintiff corporation given before this court on May 7, 1971.

I note that Mrs. Muck admits that the plaintiff does about thirty percent of the ready-mix concrete business in Western New York. This would be an extremely large percentage of the ready-mix concrete business in Western New York, considering the number of companies engaged in that business in this area. A fairly complete list of our competitors, including the plaintiff, is annexed hereto and marked Exhibit A.

Mrs. Muck testified that Pine Hill does between 60 and 70 percent of the business. This assertion is greatly exaggerated. Among the competitors listed are Buffalo Gravel Corporation, which handles a large percentage of the ready-mix business in Western New York area. The same may be said of Clarence Ready Mix Concrete Corporation. However, it is fair to say that Pine Hill, Buffalo Gravel Corporation and the plaintiff George Frey Ready-Mix Concrete, Inc. are the three largest ready-mix concrete companies in Western New York.

Also annexed hereto is a list of concrete ready-mix jobs recently handled by the plaintiff, as well as jobs currently being done by the plaintiff. The court will note that this includes the new University of Buffalo, Amherst Campus job.

Defendants' Supplemental Supporting Affidavit
of Norman M. Moran.

I have also read, with some surprise, the assertion of counsel for the plaintiffs made before the court on May 7, 1971, as follows: (p.37)

> "---and as a result my clients cannot compete with Pine Hill and they can't even bid on contracts against them and as a result, Your Honor, probably sees the Pine Hill trucks all over the city on these big concrete jobs and the Frey trucks are not in sight anywhere. There is no way we can compete with them. If, Your Honor, would grant an order---".

The Frey company owns and operates between 35 and 40 large, modern ready-mix trucks.

The plaintiff not only can, but does bid on contracts against us and successfully. The plaintiff not only can but does compete with us and successfully. For example: we bid on the University of Buffalo Amherst Campus job, the Buffalo Evening News job, and the UDC Housing Development job and New York State Thruway against the plaintiff and other ready-mix companies. (Schedule Bennexed) In each instance, the plaintiff got the job.

For background, Pine Hill bought out Pfohl Brothers in 1957. The defendant Regent was then formed and all fixed assets of Pfohl Brothers, Inc. were transferred to Regent, which still owns them. Regent is not an operating company. Regent leases real property and equipment to Pine Hill, which is an operating company.

Also annexed hereto (Schedule C) is a summary of the price increases which went into effect on March 1, 1968 and December 1, 1970. Had the plaintiff not refused to pay the increased price (See affidavit of Charles J. McDonough hereto annexed), these are the prices which the plaintiff would have had to pay, either under the plaintiffs' theory that the contract was renewed after the original 15 year period, or under the defense contention that although the original contract was no longer in existence, Pine Hill continued to sell sand and gravel to Frey at the prices charged and paid between 1965 and 1968.

Also annexed hereto and marked Schedule D is a schedule which shows the tremendous financial windfall which would accrue to the plaintiffs if compliance with the order of May 7, as originally drafted by counsel for the plaintiff, is enforced. This is based on the amount of sand and gravel sold to Frey during 1967 prior to Frey's refusal to agree to the escalated price, as provided under the contract and which price escalation was observed by the parties from 1949 until 1968.

The only reason the plaintiff refused to accept the new "prevailing pit price" in 1968 was the contention of the plaintiffs that they had not been notified thereof on or before February 1, 1968, and that therefore, the 1968 price increase would not become effective on April 1, 1968.

A copy of our letter to Frey of February 6, 1968,

return receipt and new price list enclosed herein, are annexed hereto and marked respectively Schedules E and F.

We ask the court to disregard the earlier exhibit notations on these documents. They were marked at an examination before trial on August 27, 1969, at an examination before trial in the Supreme Court action between the parties, referred to in Mr. McDonough's affidavit.

Also enclosed hereto (Schedule G) is a copy of letter of January 23, 1958, with registered mail receipt attached.

Had Frey lived up to his contract, and had our deliveries continued, there is no question but that the plaintiffs would have been notified of any further increase in our prevailing pit prices in 1969, 1970 and 1971, prior to February 1st of each year.

The "prevailing pit prices" are the prices which all of our customers pay. The plaintiffs were receiving a 20% discount on this price, as well as a further 2% discount for prompt payment.

All the material during the spring, summer and fall which was delivered to the George C. Frey Batch Plant came from our Peppermint Road Plant. During the winter time such material

was delivered to the George C. Frey Batch Plant came from our Genesee Plant or our Buffalo sand Plant because our Peppermint Road Plant was closed for the winter. Frey's winter requirements were always very small, as were our own.

In order to supply Frey properly it was necessary for us to have a weighmaster, a dump truck driver, a dump truck, a hi-lift operator. Our orders were to keep their bins filled up daily. We loaded our truck, weighed it and dumped it into Frey's bins in the presence of their weighmaster. We kept a record in duplicate of all the loads which were made during the day. At the end of the day, our truck driver would have the Frey Weighmaster sign both slips, then keep the duplicate and return the original to our truck driver who would return it to our weighmaster.

Our Peppermint Road Plant had its normal closing down in the late fall of 1968. Since we ceased delivery to Frey on February 1, 1969 this plant has not reopened. The Peppermint Road Plant presently has no electrical power because the power transformers have been removed. Consequently it would be impossible to start up this plant now.

The Peppermint Road Plant was used only to supply Frey and our own trucks. After Frey refused to pay our bills in 1968-1969, we never re-opened the Peppermint Road Plant in 1969.

Defendants' Supplemental Supporting Affidavit of Norman M. Moran.

Deponent estimates that it will take about one month to get the Peppermint Road Plant back in shape to make further deliveries to Frey, if the Court so orders.

(s) Norman M. Moran

Sworn to before me this
14th day of May, 1971.

(s) Charles S. McDonough

CHARLES S. McDONOUGH
Notary Public, State of New York
Qualified in Erie County
My Commission expires Mar. 30, 1972

Amherst Ready xed Concrete Corp.

Buffalo Gravel Corp.

Clarence Red.-mix Concrete Corp.

Quality Concrete Inc.

County line Ready Mix

Stone Concrete Mix Co. Inc.

Riley Ready Mix Concrete Corp.

Bender Ready Mix

Riefler Ready Mix

Geo. C. Frey Ready Mix Concrete Inc.

Certified Empire N. Tonawanda

H. H. Phennig Ready Mix

Schebell Ready Mix Inc.

Robert Buyers Ready Mix

"SCHEDULE A"

Defendants' Supplemental Supporting Affidavit
of Norman M. Moran.

EXAMPLES OF CURRENT JOBS BEING DONE BY

GEORGE C. FREY READY-MIXED CONCRETE, INC.

U.B. - AMHERST CAMPUS -

BUFFALO EVENING NEWS JOB- DOWNTOWN BEHIND THE STATE OFFICE BUILDING

STATE TEACHER'S COLLEGE- ELMWOOD CAMPUS

U.B.C. HOUSING DEVELOPEMENT
APARTMENT PROJECTS
NIAGARA & VIRGINIA STREETS - 2 PHASES

EXAMPLES OF JOBS RECENTLY DONE BY

GEORGE C. FREY READY-MIXED CONCRETE, INC.

N.Y.S. THRUWAY- SOUTH OF WALDEN AVE. NEAR BROADWAY

SEWER WORK ON CHURCH STREET NEAR THE ERIE COUNTY
OFFICE BUILDING.

"SCHEDULE B"

Defendants' Supplemental Supporting Affidavit
of Norman M. Moran.

PINE HILL CONCRETE MIX CORP.

PRICE INCREASES PER TON SINCE 1-1-67

	INCREASE EFFECTIVE March 1, 1968	
	FROM	TO
Concrete Sand	$2.20	$3.20
Gravel #1 (5/8" top size)	$2.40	$2.50
Gravel #2 (1 1/4" top size)	$2.20	$2.50

	INCREASE EFFECTIVE December 1, 1970	
	FROM	TO
Concrete Sand	$3.20	$3.50
Gravel #1 (5/8" top size)	$2.50	$3.00
Gravel #2 (1 1/4" top size)	$2.30	$2.75

"SCHEDULE C"

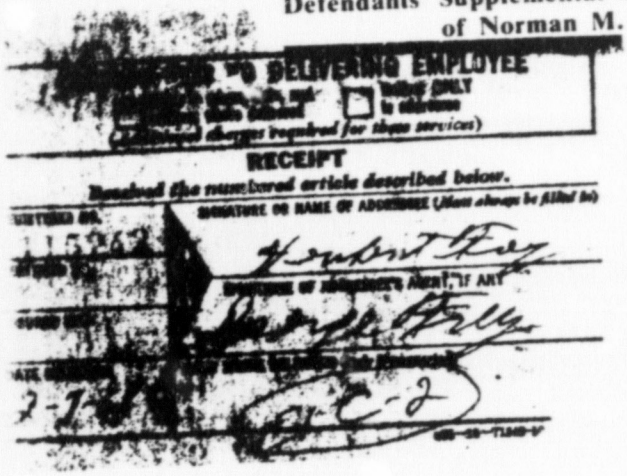
PINE HILL CONCRETE MIX CORP.

Schedule of Loss of Revenue If required to sell 1967 Tonnage at 1967 prices instead of at the current 1971 prices.

	Concrete Sand	Gravel #1	Gravel #2	Total Tons	Total Revenue Loss
Current 1971 prices per ton (a)	3.50	3.00	2.75		
1967 Prices per ton (b)	1.76	1.92	1.76		
Difference in price	1.74	1.08	.99		
Tons sold in 1967	51,551.35	29,966.50	5,868.80	87,386.65	
Loss of revenue-difference in price times tons sold	89,699.35	32,363.82	5,810.11		127,873.28
Add delivery charge of $.70 ton on total tons of 87,386.65					61,170.66
Total Revenue Loss					189,043.94

(a) Exclusive of delivery charge
(b) Includes delivery

"SCHEDULE D"


DELIVERING EMPLOYEE
RECEIPT
Received the numbered article described below.
SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)
Herbert Frey
SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
Sharon A. Kelly
C-2

FEBRUARY 9, 1968

GEORGE C. FREY
561 PAVEMENT ROAD
LANCASTER, NEW YORK 14086

DEAR SIR:

ENCLOSED IS OUR PRICE LIST EFFECTIVE APRIL 1, 1968.

YOU WILL, OF COURSE, BE ALLOWED 20% AND 2% DISCOUNT FROM

THE PRICES AS SHOWN ON THE ENCLOSED LIST.

SINCERELY,

THOMAS J. SHELTON
OFFICE MANAGER

TJS:kz
ENC.

SCHEDULE "E

Defendants' Supplemental Supporting Affidavit
of Norman M. Moran.

PRINTED IN U.S.A. 2255-8-7-6

OFFICE AND YARD

2255 BAILEY AVENUE, BUFFALO 11, N. Y.
JANUARY 31, 1968

PRICE LIST - F.O.B. PIT - EFFECTIVE MARCH 1, 1968

WASHED & SCREENED SAND--

ASPHALT SAND	$2.50	PER TON
BRICK "	2.50	" "
CONCRETE "	3.20	" "
PLASTER "	3.20	" "
FILTER " *	3.50	" "

WASHED & SCREENED GRAVEL--

#1A ROOFING GRAVEL..(1/4" TOP SIZE)		$2.50	PER TON
" " ..(5/16" " ")		2.50	" "
" " ..(3/8" " ")	*	2.50	" "
#1 " ..(5/8" " ")		2.50	" "
#2 " ..(1 1/4"" ")		2.30	" "
#3 & #4 "		2.00	" "

BANK RUN GRAVEL OR BANK RUN SAND.....	*	$ .70	PER TON
-4" CRUSHED BANK RUN (ITEMS 3 OR 3x)	*	1.20	" "
-3" " " " (ITEM 2 EFB)	*	1.20	" "
-2" " " " (ITEMS 2 EFBx OR ITEM 4)	*	1.40	" "
-1" " " "	*	1.40	" "
-3/4" " " "	*	1.40	" "
DIRT FILL - $1.00-2.00-3.00 PER LOAD	*	ACCORDING TO SIZE	
TOP SOIL	*	1.00	PER YARD
LEACH BED FILL.....	*	1.00	" "

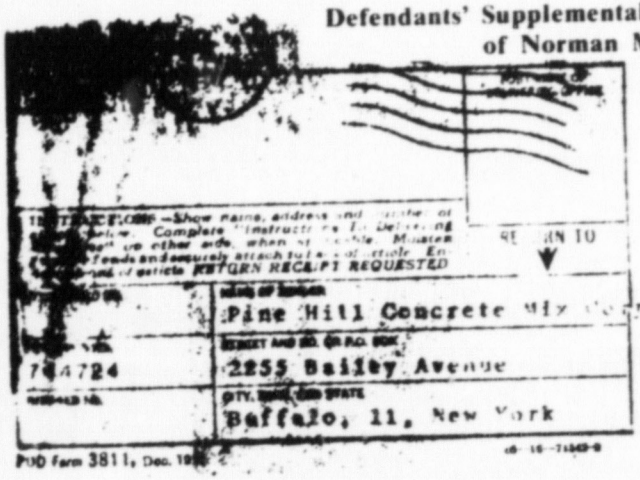
* IF AVAILABLE

TRUCKING CAN BE ARRANGED, CHARGES UPON REQUEST.

PIT LOCATIONS

SAND & GRAVEL	324 PAVEMENT RD.	LANCASTER	683-6205
SAND & GRAVEL	PAVEMENT & PEPPERMINT	"	683-2483
SAND & GRAVEL	GENESEE & SHISLER	"	683-4224
BANK RUN GRAVEL, SAND, & FILL	JONES & RANSOM	"	759-8189

SCHEDULE "F



January 23, 1958

Mr. George C. Frey
George C. Frey Batching Plant, Inc.
361 Pavement Road
Lancaster, New York

Dear Mr. Frey:

As per our agreement, please be notified that we request an increase in price, on or before April 1, 1958.

Very truly yours,

PINE HILL CONCRETE MIX CORP.

Ludwig F. Kahle
President

LFK:jce

Certified Mail - Return Receipt Requested

SCHEDULE "G"

Defendants' Supplemental Supporting Affidavit
of Charles J. McDonough.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY and LOIS MUCK as Co-Executors
of the Estate of GEORGE C. FREY, Deceased

Plaintiffs

Civil Action No. 1970-277

vs.

SUPPLEMENTAL SUPPORTING AFFIDAVIT

PINE HILL CONCRETE MIX CORP.
REGENT SAND & GRAVEL, CORP.
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL, AND FIDELIS H.
PFOHL, Individually and as the
Controlling and Surviving
Directors, Officers and Shareholders,
Liquidators and Receivers of the
Assets of PFOHL BROTHERS, INC., a
Dissolved Corporation, and
PFOHL BROTHERS, INC.

Defendants

* *

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

CHARLES J. McDONOUGH being duly sworn, deposes and says that he is the attorney for the defendants herein. This supplemental affidavit is made in further support of a motion to vacate, modify and resettle the order of this court made and entered on May 7, 1971.

Deponent has been engaged in the trial of an action in Supreme Court, Genesee County, from Monday, May 10, 1971 until

Thursday, May 13, 1971. Since deponent's first affidavit was sworn to on May 10, 1971, deponent has had his first opportunity on May 13, 1971, to read the transcript of the proceedings before this court on May 7, 1971, when the order in question was granted.

Since deponent and Mr. Weiss appeared in court on March 5, 1971, when the court set the time-table for first interrogatories and depositions (April 12, April 19, and May 17, 1971, Transcript p. 32) deponent has been continually engaged in court in various phases of litigation; e.g. representation of three witnesses before the Erie County Grand Jury in its Dome Stadium investigation; trial of action of D'Angelo vs. Taber Instrument Corporation in Supreme Court, Erie County on March 15, 1971.

Mr. Norman Moran, Controller of the defendant Pine Hill Concrete Mix Corporation, an essential party to preparation for answering the interrogatories, was out of town on his annual vacation from March 23 to April 6, 1971.

On March 22, 1971, deponent began an extended series of examinations before trial in the case of Clinton-Rossler Corporation vs. numerous fire insurance companies, an action now pending in Supreme Court, Erie County, which were held on a day to day basis, pursuant to Supreme Court order, at the office of HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR, No. 1 M & T

Plaza, Buffalo, New York. These depositions continued daily thereafter, five days per week, with the exception of one day, for a period of five weeks, until Thursday, April 22, 1971. Deponent attended said depositions for the entire day each day thereof. The depositions were adjourned on Thursday, April 22, 1971 until June 14, 1971, when it is anticipated they will continue for a further period of between one and two weeks.

Recognizing that it would be impossible to meet the deadline set for the interrogatories and depositions set by this court on March 5, 1971, deponent on April 7, 1971 called Mr. Weiss and advised him of the reason why it would be impossible to meet the deadline.

On April 16, 1971, deponent wrote to Mr. Weiss along the same lines requesting that we "---see Judge Curtin, when mutually convenient, to arrange a new time table with respect to the interrogatories and EBTs in our case."

Mr. Weiss did not reply to deponent's letter. Instead, he served the motion to strike the defendants' answer and for other relief, which resulted in the order entered herein on May 7, 1971. A copy thereof is annexed hereto (Exhibit A).

As mentioned by the court (Transcript p. 30), deponent discussed with the court a proposed adjourned date for trial of another case. The reason deponent "said nothing to me

(Judge Curtin) about this matter" (p.30) is that deponent saw no need to mention the status of Mr. Weiss' motion at that time, particularly in view of the fact that Mr. Weiss was not present.

Deponent intended to, and did thereafter call Mr. Weiss on May 5 and May 6, 1971 to advise him of the necessity of deponent's presence in New York on Friday, May 7, 1971. On neither date did Mr. Weiss return deponent's call (p. 4 original McDonough affidavit).

On May 7, 1971, in court, Mr. Weiss stated to the court (p. 37, transcript):

> "---they (Frey) can't even bid on contracts against them (Pine Hill) and as a result, Your Honor, probably sees the Pine Hill trucks all over the city on these big concrete jobs and the Frey trucks are not in sight anywhere."

The Frey Ready-Mix Concrete trucks were in fact readily visible to all on-lookers, including the court, during the progress of the recent sidewalk construction job on Court Street, Franklin Street, Niagara Street and Niagara Square around the U. S. Court House. The Frey trucks were delivering orders of ready-mix concrete for some time on that job.

The plaintiff has suffered no prejudice by reason of the unavoidable delay in answering the interrogatories and conducting the depositions. Whether the interrogatories were answered, and the depositions were conducted in March or April,

or during the coming summer, will make absolutely no difference in the eventual result. The case cannot possibly be tried before the fall or winter of 1971.

As pointed out in our original affidavit, no such drastic interim relief as that granted the plaintiffs herein was requested in the plaintiffs' notice of motion. In fact, Mr. Weiss conceded this on March 7, 1971 when he informed the court (transcript p. 36):

> "Your Honor, what we would like to have done really, Your Honor, is - this is a little bit beyond the motion,---".

The court on May 7, 1971 (p.38) stated its desire "---to get some disposition of this case which is going to be practical and fair under the circumstances."

Deponent submits that the defendants have neither intended to, nor have they in fact "refus(ed) to submit to the orders of this court---".

The plaintiffs' claim of poverty and inability to compete (p.38-9) is completely belied by Mrs. Muck's testimony (p.40) that although "possibly Pine Hill has at least sixty to seventy percent of the business", Frey has thirty percent of the ready-mix concrete business in the Buffalo area.

Mrs. Muck admitted that Frey owns both a batching

plant, and a gravel pit in Alexander, New York which supplies fifty percent of Frey's product (pp. 44-5).

Mr. Weiss' statement that the interim relief requested "is a little bit beyond the motion" is a masterpiece of understatement. In requesting the court to grant an order directing the defendant, Pine Hill to sell to Frey "at the prevailing prices that last were in effect that we agreed to with the discount" and later incorporating in the order the phrase "upon the same prices, terms, conditions and discounts as defendants sold and delivered to plaintiff during the calendar year 1967;---" counsel secured for his client a potential financial windfall far in excess of any benefits the plaintiff could have received, even if the contract continued during 1968, 1969, 1970 and 1971; for the following reasons:

The 1949 contract which is at issue herein and a copy of which is hereto annexed, contains some important escalator provisions concerning which the court was not informed on May 7. Said contract is annexed hereto and marked "Schedule B".

Paragraph 13 provides that Pfuhl Brothers Inc. (Pine Hill's assignor) shall sell to Frey the concrete, sand, grit and gravel "---for the prices and upon the terms which shall be agreed to annually by the parties hereto and set out on a written schedule signed by both parties to this agreement".

Paragraph 17, as amended December 31, 1949, reads

as follows in its entirety:

"17. Prices for sand, grit and gravel to be furnished by PFOHL BROS. INC. to GEORGE C. FREY and purchased by GEORGE C. FREY hereunder, shall be adjusted and fixed on a separate written schedule by mutual agreement once each year as of April 1st during the term of this contract and shall remain in effect for a period of one (1) year thereafter, unless modified in writing by mutual agreement, (it being the intent of the parties hereto that the prices so fixed for one year shall be binding on the parties for one year, except as herein provided)

If any party to this contract shall desire that a change or revision be made in the prices of sand, grit or gravel to be sold and delivered under this agreement effective on and after the 1st day of the following April, such party shall give written notice by registered mail of his request for such change of prices, at least sixty (60) days prior to such first day of the following April. Changes or revisions can only be made to conform with prevailing pit prices.

Prices are to be prevailing pit prices, less twenty percent (20%). Two percent (2%) discount will be allowed if bills for previous month are paid on or before the 10th day of the following month."

(Matter in parenthesis new; emphasis ours)

Paragraph 19 of the plaintiffs' complaint alleges:

"---the prices to be charged for said gravel would at all times be the prevailing pit prices which were prevailing in the area, as the same would be mutually agreed upon and fixed by the parties on or before February 1st of each year, and to be effective on or after April 1st of said year, after deducting therefrom a discount of 20%, plus 2% for prompt payment, or a total discount of 21.6% or a net price of 78.4% of prevailing pit prices in the area, as so agreed upon and fixed; all as more fully set forth in said agreements and the amendments thereto."

On information and belief, there were no price adjustments between 1957, when the defendant bought out Pfohl Brothers, and 1967, except in 1958.

However, in February, 1968, the defendants did notify Frey of their intention and desire to increase the price of sand and gravel, pursuant to the provisions of Paragraph 17. Frey thereupon refused to agree to the price increase, but only on the ground, as Frey claimed, he was not notified of the defendants' intention to increase the price on or before February 1, 1968.

The defendant Pine Hill continued thereafter to deliver sand and gravel to Frey until on or about January 31, 1969. Although Frey was billed at an increased rate each month, he refused to pay the increase. Pine Hill thereafter brought suit against Frey in Supreme Court, Erie County for a balance of $40,026.03 due for sand and gravel delivered between April 1, 1968 and January 31, 1969. That action is still pending.

Even if the contracts had remained in full force and effect, the defendants concededly would have had the right, and would have raised the price of sand and gravel during 1969, 1970, and 1971, to conform with "prevailing pit prices", which the defendants other customers were paying each year.

Defendants' Supplemental Supporting Affidavit
of Charles J. McDonough.

Typical price schedules of the defendant Pine Hill, one dated April 1, 1958 (Schedule C) and one dated December 1, 1970 (Schedule D), are annexed hereto.

Annexed hereto is the affidavit of Norman Moran, Controller of the defendant Pine Hill, sworn to May 14, 1971. A study of the annual prevailing pit prices set forth therein, for 1968, 1969, 1970 and 1971, show clearly the potential windfall Mr. Weiss has arranged for his clients, in inserting a provision in the order that the defendants sell to Frey during the pendency of the litigation, at the 1967 prevailing pit price. What this would amount to, if enforced, would be to give the plaintiffs a discount of almost 50% on the prices of sand and gravel, in addition to the 20% he would otherwise be entitled to.

This is obviously unfair and inequitable. Deponent feels certain that the court, in granting the order of May 7, had no intention of giving the plaintiffs such a tremendous financial advantage, or of so drastically penalizing the defendants, pending trial of this action.

Even if the plaintiffs are successful, upon trial, insecuring the injunctive relief sought, and the reinstatement of the contracts, it will have to be at prevailing pit prices, not at 1967 prices.

Neither deponent nor his client have ever intended to, nor do they desire to delay the answering of the interrogatories or the taking of the depositions.

Deponent therefore requests that the court delete the first three ordering paragraphs of the order of May 7, 1971, and impose such further reasonable controls and safeguards designed to expedite the answering of the interrogatories and the taking of the depositions, as the court deem proper.

CHARLES J. McDONOUGH

Sworn to before me this 14th
day of May, 1971

Kathleen Whalen

KATHLEEN E. WHALEN
Notary Public, State of New York
Qualified in [illegible] County
My Commission Expires March 30, 1973

Defendants' Supplemental Supporting Affidavit
of Charles J. McDonough.

April 16, 1971

Mr. Arnold Weiss
Attorney at Law
10 Lafayette Square
Buffalo, New York 14203

Re: George C. Frey Concrete v. Pine Hill Concrete et al

Dear Arnold:

Supplementing our telephone conversation of April 7, I beg to advise that I am still involved in the fire insurance EBTs which began on March 22. They will continue at least thru next week.

It will apparently be necessary for us to see Judge Curtin, when mutually convenient, to arrange a new time table with respect to the interrogatories and EBTs in our case.

Sincerely yours,

Charles J. McDonough

CJM/L

SCHEDULE "A"

Defendants' Supplemental Supporting Affidavit of Charles J. McDonough.

AGREEMENT, made this 17th day of May, 1949, by and between GEORGE C. FREY, residing in the Town of Lancaster, New York, whose office and post office address is William Street, R.F.D. #2, Lancaster, New York, party of the first part, and PFOHL BROS. INC., a business corporation organized and existing under the laws of the State of New York, and having its principal office at Pfohl Road, in the Town of Cheektowaga, New York, party of the Second part;

WHEREAS, GEORGE C. FREY is the owner of the following described real property on which there are deposits of sand, grit and gravel, suitable for commercial use, and which PFOHL BROS,INC., desire to purchase:

ALL THAT TRACT OR PARCEL OF LAND, situate in the Town of Lancaster, County of Erie and State of New York, being part of Farm Lots Numbers Four (4) and Six (6), in the Fifth (5th) Section, Township Eleven (11) and Range Six (6), according to the Holland Land Company's Survey, bounded and described as follows:

BEGINNING at a point in the northerly line of Lot Number Six (6), which is also the center line of Peppermint Road, distant easterly six hundred and two (602) feet from the northwest corner of said Farm Lot Number (6); running thence southwardly parallel with the westerly line of said Farm Lot Number Six (6), one thousand seven hundred and seven and thirty-four hundredths (1707.34) feet; running thence eastwardly along the southerly line of lands conveyed by the Buffalo Sand Co Inc. to the party of the first part by deed dated April 29, 1949 and recorded in the Erie County Clerk's Office on that day in Liber 4509 of Deeds at page 443, two thousand thirty-nine and thirty-two hundredths (2039.32 feet to a stake situated on the easterly line of Lot Number Four (4), distant southerly one thousand five hundred forty-five and seventy-two hundredths(1545.72) feet from the northeasterly corner of said lot; thence northerly along the easterly line of said Lot Number Four (4), one thousand five hundred forty-five and seventy-two hundredths (1545.72 feet to the northeast corner of said lot, said point being also in the center line of Peppermint Road; thence westerly along the northerly line of said Lot Number Four (4), one thousand two hundred twenty-five and sixty-two hundredths (1225.62) feet; thence southerly at right angles, one hundred thirty-two (132) feet; thence westerly at right angles, eighty-two and five tenths (82.5) feet; thence northerly at right angles, one hundred thirty-two (132) feet to the northerly line of said Lot Number Four (4); thence westerly along the northerly line of Lots Numbers Four (4) and Six (6), six hundred twenty-two and fifty-one hundredths (622.51) feet to the place of beginning, containing seventy-five and sixty hundredths (75.60) acres, be the same more or less.

SCHEDULE "B"

Defendants' Supplemental Supporting Affidavit of Charles J. McDonough.

SUBJECT, however, to a certain oil and gas lease originally made, executed and delivered by Frank J. Weil and Alma K. Weil, his wife, to Depew and Lancaster Light, Power and Conduit Company, dated August 28, 1925, and recorded in the Erie County Clerk's Office on September 3, 1925, in Liber 1547 of Deeds at page 232, and all renewals and modifications thereof.

SUBJECT also to a certain right of way given by Buffalo Sand Co., Inc., to New York State Electric & Gas Corporation, dated February 15, 1946, and recorded in the Erie County Clerk's Office on June 19, 1946, in Liber 3917 of Deeds at page 516.

SUBJECT also to the rights of Franklin J. Weil and Alma K. Weil, his wife, as tenants or said premises to occupy the same until April 1, 1950.

and

WHEREAS, GEORGE C. FREY is engaged in the businesss of preparing, selling and delivering ready-mixed batches of concrete for use in construction projects and has erected upon the said premises, equipped, maintained and operated a batcher plant at or near the aforesaid deposit of sand, grit and gravel, and has heretofore purchased washed and screened sand, grit and gravel secured from the premises before-mentioned for use in manufacturing batches of concrete aggregate, and said PFOHL BROS. INC. is purchasing all of the foregoing premises, including the premises upon which the batcher plant of said GEORGE C. FREY is located, and it is desired by GEORGE C. FREY to retain the use of the said batcher plant and to secure sand, grit and gravel for the continuance of its operation,

NOW, THEREFORE, in consideration of the foregoing and the covenants, terms and conditions hereinafter expressed, the above named parties have agreed, and do mutually agree as follows:

1. PFOHL BROS. INC. does hereby lease to GEORGE C. FREY, for a rental of Ten Dollars ($10.00) per year, and the other considerations herein expressed, all of that part of the premises shown on the survey annexed hereto and marked, "Exhibit A", including all appurtenances thereto.

Defendants' Supplemental Supporting Affidavit of Charles J. McDonough.

2. The entire cost of the equipment and maintenance of said batcher plant upon said premises and of its machinery, bins, scales, equipment, water reservoir, wells, retaining walls, foundations, driveways and other ways, works and means relating thereto is assumed and shall be borne by GEORGE C. FREY, exclusively, without contribution from PFOHL BROS. INC.

3. All risk of damage to said batcher plant or to its equipment, or its personnel and workmen, or to the public, resulting from fire, cave-in, lightning, dust, accident, or other cause, shall be assumed and borne by GEORGE C. FREY, excepting damage resulting from cave-ins, if any, that shall be caused by excavation made by PFOHL BROS. INC., in too close proximity to the structures or driveways of said plant.

4. All portable buildings and equipment which shall be erected or installed by GEORGE C. FREY upon the land purchased by PFOHL BROS. INC. under this agreement shall be and remain the property of GEORGE C. FREY, subject to the conditions hereinafter stated, but all driveways, retaining walls, foundations and well installed thereon by GEORGE C. FREY shall become and remain the property of PFOHL BROS. INC., exclusively, without obligation or contribution on its part, except as hereinafter set forth.

GEORGE C. FREY shall, during the term of this contract, be solely responsible for the safety and stability of retaining walls, foundations, wells and driveways and all other instrumentalities placed by him upon the premises purchased by PFOHL BROS. INC., for use in connection with the construction, equipment and/or operation of the batcher plant, but PFOHL BROS.INC. shall not excavate sand grit or gravel in such close proximity to said plant as to weaken or endanger the foundations or driveways thereof.

5. GEORGE C. FREY shall cause the assessed value of the structures, constituting his batcher plant, placed on the

Defendants' Supplemental Supporting Affidavit of Charles J. McDonough.

lands purchased by PFOHL BROS. INC., to be separately determined and fixed by the Board of Assessors, or other proper municipal board, or officer, of the Town of Lancaster, and shall promptly pay all taxes and assessments, based on the assessed valuation of such batcher plant, that shall be levied against said batcher plant, or against the portion of the lands purchased by PFOHL BROS. INC occupied as the batcher plant site, during the term of this agreement.

6. GEORGE C. FREY shall use due care and caution in and about the operation of the concrete batcher plant contemplated under this contract, and shall not cause or permit any loss, damage, or nuisance, in or about the operation of said plant and shall, at his sole expense, protect and defend PFOHL BROS. INC., and its officers, agents and servants, from and against any and all claims, demands, actions and suits that may be asserted or brought against said PFOHL BROS. INC., or against its officers, agents or servants, as a result of the operation of the aforesaid batcher plant by GEORGE C. FREY on the land purchased by PFOHL BROS. INC., and said GEORGE C. FREY shall, at his sole expense, carry and maintain, during the term of this contract, full and adequate workmen's compensation insurance, covering all of his employees and shall also carry public liability and boiler explosion insurance with limits of $50,000.00 to $100,000.00, with solvent insurance carriers, duly licensed under the Laws of the State of New York, for the protection of himself and PFOHL BROS. INC., and shall deliver to PFOHL BROS.INC., on request, certificates issued by such insurance carriers, showing such insurance to be in full force and effect.

7. No other concrete batcher plant may be erected or operated on the premises purchased by PFOHL BROS. INC.,

located at the junction of Pavement and Peppermint Roads, in the Town of Lancaster, New York, or any other property which PFOHL BROS. INC. now or hereafter may own, lease or operate, while a batcher plant is operated by GEORGE C. FREY or by his heirs, legal representatives, successors or assigns, under this agreement. GEORGE C. FREY, his heirs, legal representatives, successors or assigns, shall not operate a washer plant or process sand and gravel within the County of Erie while this contract is in effect.

In the event that GEORGE C. FREY shall acquire any other property on which there may be gravel deposits, and in the event that he shall decide to cause the same to be made available for the purpose of processing sand, grit or gravel, he hereby agrees to give PFOHL BROS. INC. the first chance to operate the same upon terms to be negotiated and agreed upon between the parties. The said PFOHL BROS. INC. shall be given thirty (30) days' written notice of the availability of such gravel deposits. All stripping of overburden shall be done by PFOHL BROS. INC. Sand, grit and gravel shall be sold at not to exceed ten cents (10¢) per ton by said GEORGE C. FREY to PFOHL BROS. INC. In the event that PFOHL BROS. INC. fails to exercise such option, the property in question may be sold to any other person, firm or corporation.

In the event that GEORGE C. FREY shall acquire the property situated on the west side of Pavement Road, and directly across from the Weil Farm, then he agrees to give to PFOHL BROS. INC. a right-of-way forty (40) feet in width along the southerly line of the premises retained by GEORGE C. FREY from the Weil Farm, said right-of-way to run until the pit is no longer operated commercially.

8. PFOHL BROS. INC. shall make, promulgate and enforce rules requiring all of its employees to keep off the premises hereby leased to GEORGE C. FREY, except while on the business of

Defendants' Supplemental Supporting Affidavit of Charles J. McDonough.

PFOHL BROS. INC.

9. GEORGE C. FREY shall make, promulgate and enforce rules requiring all of his employees to keep off the premises purchased by PFOHL BROS. INC. not covered by the lease to GEORGE C. FREY, except while on the business of GEORGE C. FREY.

10. In the event that GEORGE C. FREY, his heirs at law, legal representatives, successors or assigns, shall decide to discontinue or sell the (ready mix concrete business or) batcher plant under this agreement and to sell the portable portions thereof, and the machinery, equipment, (trucks and) appurtenances used in connection with the operation thereof, notice in writing to that effect, stating the price, terms and conditions upon which such property will be sold and conveyed shall be given to PFOHL BROS. INC., by registered mail, and the said PFOHL BROS. INC. shall have thirty (30) days from the receipt of such notice in which to purchase said batcher plant, together with the machinery, equipment and appurtenances thereof, (and the trucks used in and about the operation thereof,) upon the terms and conditions and for the price stated in such written notice.

If PFOHL BROS. INC. shall not exercise the option to purchase said plant and its equipment, etc., as hereinbefore provided within thirty (30) days from the receipt of such written notice, GEORGE C. FREY, his heirs, legal representatives, successors or assigns, may offer the said plant and its equipment for sale to the public. However, if said plant is not operated for a period of at least one (1) year without a sufficient and proper reason being shown to the satisfaction of PFOHL BROS. INC., said PFOHL BROS. INC. may, be registered mail addressed to GEORGE C. FREY or his legal representatives, at "William Street, R.F.D. #2, Lancaster, New York", or to his successors or assigns at their addresses, order the plant removed in six (6) months if no just cause or reason can be given for failing to operate the same. If such plant shall be removed, however, the retaining

modified 12/31/79 (omitted)

walls, foundations and wells thereof shall not be disturbed. However, said GEORGE C. FREY may remove the roadway or ramp from the retaining wall to the plant, and any steel beams which may be welded to the retaining wall may be likewise removed.

11. The said PFOHL BROS. INC. agree to furnish to GEORGE C. FREY for the use in his batcher plant located upon the premises herein described, sand grit and gravel as he may require from any pit or property which they now or hereafter own, lease or operate located in the County of Erie, at the pit price delivered in the bins at the batcher plant herein described, less discounts hereinafter mentioned.

In the event that said GEORGE C. FREY desires to expand the batcher plant facilities herein referred to, PFOHL BROS. INC. will cooperate to the fullest extent and, if necessary, at the option of the said GEORGE C. FREY, include a new location at any other pit or washing plant owned, leased or operated by said PFOHL BROS. INC. However, any new crushed stone batcher plant at a site on any premises now or hereafter owned, leased or operated by PFOHL BROS. INC. other than at Pavement and Peppermint Roads, Town of Lancaster, New York, shall be covered by a new agreement between the parties.

12. This lease shall inure to the benefit of the heirs, representatives, administrators, executors, successors and assigns of the said GEORGE C. FREY, and may be assigned by him or them, or sublet in whole or in part at any time during the term thereof or the term of any renewal thereof.

13. PFOHL BROS. INC. has agreed and does hereby agree to sell and deliver, during the term of this contract, to GEORGE C. FREY, and to his heirs at law, legal representatives, successors and assigns, at the batcher plant on the premises purchased by PFOHL BROS. INC., at Pavement and Peppermint Roads, in the Town of Lancaster, or such other plant or plants as may replace it, washed and screened concrete sand, grit and gravel from the said pits. The sand and grit, referred to in this

agreement, shall pass through a screen with a one-quarter inch mesh, or openings, and the gravel shall be of two sizes, one of which sizes shall pass through a screen with a mesh or opening one-half inch in size and shall be retained on a screen with quarter inch mesh or openings, and the other size shall pass through a screen with a mesh or opening one and one-half inches in size and be retained on a screen having a mesh or opening one-half inch in size, for the prices and upon the terms which shall be agreed to annually by the parties hereto and set out on a written schedule signed by both parties to this agreement.

The said PFOHL BROS. INC. agrees to furnish to GEORGE C. FREY, his heirs at law, legal representatives, successors and assigns, such grades of sand, grit and gravel as he may require for the operation of his business.

Exhaustion of suitable material for concrete mix at all pits owned, leased or operated by PFOHL BROS. INC. shall terminate this contract. Exhaustion shall mean lack of sand, grit and gravel in commercial quantities after suitable and thorough exploration of the properties.

14. GEORGE C. FREY, in consideration of the granting of the privilege to operate a ready mix batcher plant on the premises purchased by PFOHL BROS. INC., shall use sand, grit and gravel exclusively, in preparing and manufacturing his concrete batches, except as herein otherwise provided.

If, however, GEORGE C. FREY, or his heirs at law, legal representatives, successors and assigns shall obtain an order for concrete aggregate in which crushed stone, sand and grits are the component parts. GEORGE C. FREY may purchase crushed stone, sand and grits elsewhere and use the same in his concrete aggregate.

15. PFOHL BROS. INC. shall keep the batcher bins of GEORGE C. FREY'S batcher plant filled with sand, grit and gravel as may be required from its pits at all times during the term of

this contract, subject to the conditions and limitations expressed therein. PFOHL BROS. INC. s. ll keep a stock pile of approximately 7500 tons of material on hand for use in the batcher plant of GEORGE C. FREY.

It is understood and agreed that PFOHL BROS. INC. shall not be liable for any failure, loss, or damages caused by, or arising out of, fires, strikes, flood, war, public disorder, lawless actions, rioting, epidemics, cave-ins or causes beyond its control. While PFOHL BROS. INC. is unable to deliver sand or gravel because of any of said causes, however, GEORGE C. FREY may procure sand, grit and gravel elsewhere for use in mixing his aggregate.

16. All prices fixed under this contract include the cost of delivery of sand, grit and gravel.

17. Prices for sand, grit and gravel to be furnished by PFOHL BROS. INC. to GEORGE C. FREY and purchased by GEORGE C. FREY hereunder, shall be adjusted and fixed on a separate written schedule by mutual agreement once each year as of April 1st during the term of this contract and shall remain in effect for a period of one (1) year thereafter, unless modified in writing by mutual agreement.

Prices are to be prevailing pit prices, less twenty per cent (20%). Two per cent (2%) discount will be allowed if bills for previous month are paid on or before the 10th day of the following month.

If any party to this contract shall desire that a change or revision be made in the prices of sand, grit or gravel to be sold and delivered under this agreement effective on and after the 1st day of the following April, such party shall give written notice by registered mail of his request for such change of prices, at least sixty (60) days prior to such first day of the following April. Changes or revisions can only be made to conform with prevailing pit prices.

18. This contract shall be binding in all respects on the successors and assigns of PFOHL BROS. INC.

19. This contract shall become effective on June 1, 1949, or at such later time as title to the premises may pass to PFOHL BROS. INC., and shall continue for a term of fifteen (15) years unless sooner terminated by mutual consent, with the privilege reserved to GEORGE C. FREY to renew the said lease upon the same terms, by notice in writing of his iption to do so by registered mail addressed to PFOHL BROS. INC., at Pfohl Road, Cheektowaga, New York, or to their successors and assigns, not less than ninety (90) days prior to the termination of the fifteen (15) years provided herein.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed by GEORGE C. FREY under his hand and seal, and by PFOHL BROS. INC., under the hand of its President, thereunto duly authorized, and its corporate seal, the day and year hereinbefore first written.

GEORGE C. FREY (L.S.)
George C. Frey

PFOHL BROS. INC.
By:

(SEAL)

PAUL N. PFOHL
Paul N. Pfohl, President

STATE OF NEW YORK)
COUNTY OF ERIE) SS
VILLAGE OF DEPEW)

On this 17th day of May, 1949, before me, the subscriber, personally came GEORGE C. FREY, to me personally known, and known to me to be the same person described in and who executed the within instrument, and he duly acknowledged to me that he executed the same.

HAROLD P. KELLY
Harold P. Kelly
Notary Public
In and for Erie County, N.Y.
My Commission expires March, [illegible]

Defendants' Supplemental Supporting Affidavit of Charles J. McDonough.

STATE OF NEW YORK)
COUNTY OF ERIE) SS.
VILLAGE OF DEPEW)

On this 17th day of May, 1949, before me personally came PAUL M. PFOHL, to me personally known who, being by me duly sworn, did depose and say that he resides in the Town of Cheektowaga; that he is the President of PFOHL BROS. INC., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

HAROLD P. KELLY
Harold P. Kelly
Notary Public
In and for Erie County, N.Y.
My Commission expires March '50.

Defendants' Supplemental Supporting Affidavit
of Charles J. McDonough.

PHONE: BA 2295-6-7-8

PINE HILL CONCRETE MIX CORP.
CONTROLLED QUALITY

OFFICE AND YARD
2255 BAILEY AVENUE, BUFFALO 11, N. Y.

PRICE LIST - F. O. B. PIT - EFFECTIVE APRIL 1, 1958

Washed & Screened Sand --

Asphalt Sand	$2.20	Per Ton
Brick "	2.20	" "
Concrete " (Grit)	2.20	" "
Filter " (To Specification)	2.40	" "
Plaster "	2.20	" "

Washed & Screened Gravel --

Roofing Gravel (3/16" Top Size)	2.20	" "
#1 " (1/2 " " ") if available	2.60	" "
#1 " (9/16" " ") if available	2.60	" "
#1 " (5/8 " " ")	2.40	" "
#2 " (1 1/2 " " ")	2.20	" "
#3 and 4 "	1.80	" "
Bank Run Gravel	.70	" "
Crushed Bank Run Gravel	1.20	" "
Dirt Fill	1.00	Per Small Load
" "	2.00	" Medium "
" "	3.00	" Large "
Top Soil	1.00	Per Yard

Trucking charges upon request

Pit Locations

324 Pavement Road	Lancaster	- NT 3-6205	
Peppermint & Pavement Road	"	- NT 3-2483	
Genesee & Shisler Road	"	- NT 3-4224	
Wiltse & Shisler Road	Clarence	- NT 3-3419	(bank run only)
Stage & Billo Road	Newstead	- NF 3-8144	

SCHEDULE "C"

160

Defendants' Supplemental Supporting Affidavit
of Charles J. McDonough.

PINE HILL CONCRETE MIX CORP.

OFFICE AND YARD - 2255 BAILEY AVENUE - BUFFA[illegible] [illegible]4-22[illegible]

December 1st, 1970

PRICE LIST - F.O.B. PIT - EFFECTIVE DEC[illegible]BER 1ST, 1970

WASHED & SCREENED SAND --

ASPHALT SAND	$ 3.00	PER TON
BRICK SAND	3.00	" "
M3A MORTAR SAND	3.50	" "
CONCRETE SAND	3.50	" "
PLASTER SAND	3.50	" "

WASHED & SCREENED GRAVEL --

#1A ROOFING GRAVEL ..(5/16" TOP SIZE)	$ 3.00	PER TON
#1 " ..(5/8" TOP SIZE)	3.00	" "
#2 " ..(1½" TOP SIZE)	2.75	" "
# 3 & 4 "	2.25	" "

WASHED & SCREENED CONGLOMERATE --

SIDEWALK MIX..(5/8" TOP SIZE)	$ 3.25	PER TON
CONCRETE MIX..(1½" TOP SIZE)	3.25	PER TON

BANK RUN GRAVEL OR BANK RUN SAND	$ 1.00	PER TON
-4" CRUSHED BANK RUN	1.50	" "
-3" " " "	1.50	" "
-2" " " "	1.75	" "
-1" " " "	1.75	" "
-3/4" " " "	1 75	" "

DIRT FILL - $2.00-$4.00-$6.00 PER LOAD	ACCORDING TO SIZE	
TOP SOIL	$ 1.00	PER YARD
LEACH BED FILL	$ 1.00	PER YARD

TRUCKING CAN BE ARRANGED. CHARGES UPON REQUEST

PIT LOCATIONS

SAND & GRAVEL	324 PAVEMENT ROAD, LANCASTER	683-6205
SAND & GRAVEL	GENESEE & SHISLER ROADS, LANCASTER	683-4224
BANK RUN	JONES & RANSOM ROADS, CLARENCE	759-8189

Controlled Quality

Plaintiffs' Motion for Separate Trials.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

vs.

Civil No. 1970-277

MOTION FOR SEPARATE TRIALS

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

MOTION FOR SEPARATE TRIALS

Plaintiffs move the Court pursuant to FRCP 42(b) for separate trials of the following separate issues in order to expedite the progress and determination of this action:

PRELIMINARY SEPARATE TRIAL

Preliminary Issue 1. Was the agreement dated May 17, 1949 between plaintiffs and defendants, as thereafter amended (Exhibit 1, hereafter referred to as "Agreement") materially breached by:

Plaintiffs' Motion for Separate Trials.

A. Defendants' unilateral price increase of February 6, 1969?

B. Plaintiffs' refusal to pay defendants' price increase of February 6, 1969?

C. Defendants' letters of January 15 and January 17, 1969, and their subsequent refusal to sell to plaintiffs under the Agreement?

Preliminary Issue 2. Is said Agreement currently in effect and binding on the parties herein?

Preliminary Issue 3. Does the Court have jurisdiction over the subject matter and the defendants (Defendants' Affirmative Defenses "Third" thru "Eighth", inclusive)?

Plaintiffs' Motion for Separate Trials.

SUBSEQUENT SEPARATE TRIAL

Issue 4. Have any of the defendants violated any of the federal antitrust laws in the gravel, concrete or ready-mixed businesses or industry by:

A. Acquiring the gravel deposits, plants and business of their competitor, the defendants Pfohl (Clayton Act § 7, 15 USC 18; Sherman Act §§ 1 and 2, 15 USC 1 and 2)?

B. Monopolizing plaintiffs' sources of gravel in the Buffalo area, and acquiring plaintiffs' gravel supply Agreement (Sherman Act §§ 1 and 2, 15 USC 1 and 2)?

C. Engaging in price fixing, tie-in sales, rebates, preferences, refusals to sell, price increases, price cutting, conspiratories to monopolize, monopolization, acquisition of competitors or any other monopolistic, predatory or other illegal actions or courses of conduct (Sherman Act § 1, et seq., Clayton Act § 1, et seq., 15 USC 1, et seq.)?

Plaintiffs' Motion for Separate Trials.

Issue 5. If defendants refusal to comply with the Agreement and sell plaintiffs thereunder, was a material breach thereof, are plaintiffs entitled to damages and/or a reverter of title to the gravel plant?

Issue 6. Any and all other issues.

Plaintiffs also move the Court for such other and further relief as may be just and proper in the premises and such as may expedite the trial of this case and preserve plaintiffs as a viable competitive factor in the industry and insulate them from the effects of defendants' wrongful practices alleged in the complaint and in the annexed affidavit of Herbert G. Frey sworn to June 7, 1971.

Dated: Buffalo, New York
June 7, 1971.

RAICHLE, BANNING, WEISS & HALPERN

By_____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

TO: McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attention: CHARLES J. McDONOUGH, ESQ.
Attorneys for Defendants
930 Walbridge Building
Buffalo, New York 14202

Plaintiffs' Motion for Separate Trials.

LEASE AND AGREEMENT LIBER 4513 PAGE 251

AGREEMENT, made this 17th day of May, 1949, by and between GEORGE C. FREY, residing in the Town of Lancaster, New York, whose office and post office address is William Street, R.F.D. #2, Lancaster, New York, party of the first part, and PFOHL BROS. INC., a business corporation organized and existing under the laws of the State of New York, and having its principal office at Pfohl Road, in the Town of Cheektowaga, New York, party of the second part;

WHEREAS, GEORGE C. FREY is the owner of the following described real property on which there are deposits of sand, grit and gravel, suitable for commercial use, and which PFOHL BROS. INC. desire to purchase:

ALL THAT TRACT OR PARCEL OF LAND, situate in the Town of Lancaster, County of Erie and State of New York, being part of Farm Lots Numbers Four (4) and Six (6), in the Fifth (5th) Section, Township Eleven (11) and Range Six (6), according to the Holland Land Company's Survey, bounded and described as follows:

BEGINNING at a point in the northerly line of Lot Number Six (6), which is also the center line of Peppermint Road, distant easterly six hundred and two (602) feet from the northwest corner of said Farm Lot Number Six (6); running thence southwardly parallel with the westerly line of said Farm Lot Number Six (6), one thousand seven hundred and seven and thirty-four hundredths (1707.34) feet; running thence eastwardly along the southerly line of lands conveyed by Buffalo Sand Co. Inc. to the party of the first part by deed dated April 29, 1949 and recorded in the Erie County Clerk's Office on that da in Liber 4509 of Deeds at page 443, two thousand thirty-nine and thirty-two hundredths (2039.32) feet to a stake situated on the easterly line of Lot Number Four (4), distant southerly one thousand five h[illegible]d forty-five and seventy-two hundredths (1545.72) feet from the northeasterly corner of said lot; thence northerly along the easterly line of said Lot Number Four (4), one thousand five hundred forty-five and seventy-two hundredths (1545.72) feet to the northeast corner of said lot, said point being also in the center line of Peppermint Road; thence westerly along the northerly line of said Lot Number Four (4), one thousand two hundred twenty-five and sixty-two hundredths (1225.62) feet; thence southerly at right angles, one hundred thirty-two (132) feet; thence westerly at right angles, eighty-two and five tenths (82.5) feet; thence northerly at right angles, one hundred thirty-two (132) feet to the northerly line of said Lot Number Four (4); thence westerly along the northerly line of Lots Numbers Four (4) and Six (6), six hundred twenty-two and fifty-one hundredths (622.51) feet to the place of beginning, containing ~~sixty-six~~ and ~~five~~ hundredths (66.05) acres, be the same more or less.

1.07 06

SUBJECT, however, to a certain oil and gas lease

4518 PG 252

originally made, executed and delivered by Frank J. Weil and Alma K. Weil, his wife, to Depew and Lancaster Light, Power and Conduit Company, dated August 28, 1925, and recorded in the Erie County Clerk's Office on September 3, 1925, in Liber 1849 of Deeds at page 232, and all renewals and modifications thereof.

SUBJECT also to a certain right of way given by Buffalo Sand Co., Inc. to New York State Electric & Gas Corporation, dated February 15, 1946, and recorded in the Erie County Clerk's Office on June 19, 1946, in Liber 3917 of Deeds at page 516.

SUBJECT also to the rights of Franklin J. Weil and Alma K. Weil, his wife, as tenants of said premises to occupy the same until April 1, 1950.

and

WHEREAS, GEORGE C. FREY is engaged in the business of preparing, selling and delivering ready-mixed batches of concrete for use in construction projects a i has erected upon the said premises, equipped, maintained and operated a batcher plant at or near the aforesaid deposit of sand, grit and gravel, and has heretofore purchased washed and screened sand, grit and gravel secured from the premises before-mentioned for use in manufacturing batches of concrete aggregate, and said PFOHL BROS. INC. is purchasing all of the foregoing premises, including the premises upon which the batcher plant of said GEORGE C. FREY is located, and it is desired by GEORGE C. FREY to retain the use of the said batcher plant and to secure sand, grit and gravel for the continuance of its operation,

NOW, THEREFORE, in consideration of the foregoing and the covenants, terms and conditions hereinafter expressed, the above named parties have agreed, and do mutually agree as follows:

1. PFOHL BROS. INC. does hereby lease to GEORGE C. FREY, for a rental of Ten Dollars ($10.00) per year, and the other considerations herein expressed, all of that part of the premises shown on the survey annexed hereto and marked, "Exhibit A", including all appurtenances thereto.

LIBER 4518 PAGE 253

2. The entire cost of the equipment and maintenance of said batcher plant upon said premises and of its machinery, bins, scales, equipment, water reservoir, wells, retaining walls, foundations, driveways and other ways, works and means relating thereto is assumed and shall be borne by GEORGE C. FREY, exclusively, without contribution from PFOHL BROS. INC.

3. All risk of damage to said batcher plant or to its equipment, or its personnel and workmen, or to the public, resulting from fire, cave-in, lightning, dust, accident, or other cause, shall be assumed and borne by GEORGE C. FREY, excepting damage resulting from cave-ins, if any, that shall be caused by excavation made by PFOHL BROS. INC., in too close proximity to the structures or driveways of said plant.

4. All portable buildings and equipment which shall be erected or installed by GEORGE C. FREY upon the land purchased by PFOHL BROS. INC. under this agreement shall be and remain the property of GEORGE C. FREY, subject to the conditions hereinafter stated, but all driveways, retaining walls, foundations and well installed thereon by GEORGE C. FREY shall become and remain the property of PFOHL BROS. INC., exclusively, without obligation or contribution on its part, except as hereinafter set forth.

GEORGE C. FREY shall, during the term of this contract, be solely responsible for the safety and stability of retaining walls, foundations, wells and driveways and all other instrumentalities placed by him upon the premises purchased by PFOHL BROS. INC., for use in connection with the construction, equipment and/or operation of the batcher plant, but PFOHL BROS. INC. shall not excavate sand, grit or gravel in such close proximity to said plant as to weaken or endanger the foundations or driveways thereof.

5. GEORGE C. FREY shall cause the assessed value of the structures, constituting his batcher plant, placed on the

LIBER 4518 PAGE 254

lands purchased by PFOHL BROS. INC., to be separately determined and fixed by the Board of Assessors, or other proper municipal board, or officer, of the Town of Lancaster, and shall promptly pay all taxes and assessments, based on the assessed valuation of such batcher plant, that shall be levied against said batcher plant, or against the portion of the lands purchased by PFOHL BROS. INC. occupied as the batcher plant site, during the term of this agreement.

6. GEORGE C. FREY shall use due care and caution in and about the operation of the concrete batcher plant contemplated under this contract, and shall not cause or permit any loss, damage, or nuisance, in or about the operation of said plant and shall, at his sole expense, protect and defend PFOHL BROS. INC., and its officers, agents and servants, from and against any and all claims, demands, actions and suits that may be asserted or brought against said PFOHL BROS. INC., or against its officers, agents or servants, as a result of the operation of the aforesaid batcher plant by GEORGE C. FREY on the land purchased by PFOHL BROS. INC., and said GEORGE C. FREY shall, at his sole expense, carry and maintain, during the term of this contract, full and adequate workmen's compensation insurance, covering all of his employees and shall also carry public liability and boiler explosion insurance with limits of $50,000.00 to $100,000.00, with solvent insurance carriers, duly licensed under the Laws of the State of New York, for the protection of himself and PFOHL BROS. INC., and shall deliver to PFOHL BROS. INC., on request, certificates issued by such insurance carriers, showing such insurance to be in full force and effect.

7. No other concrete batcher plant may be erected or operated on the premises purchased by PFOHL BROS. INC.,

LIBER 4518 PAGE 255

located at the junction of Pavement and Peppermint Roads, in the Town of Lancaster, New York, or any other property which PFOHL BROS. INC. now or hereafter may own, lease or operate, while a butcher plant is operated by GEORGE C. FREY or by his heirs, legal representatives, successors or assigns, under this agreement. GEORGE C. FREY, his heirs, legal representatives, successors or assigns, shall not operate a washer plant or process sand and gravel within the County of Erie while this contract is in effect.

In the event that GEORGE C. FREY shall acquire any other property on which there may be gravel deposits, and in the event that he shall decide to cause the same to be made available for the purpose of processing sand, grit or gravel, he hereby agrees to give PFOHL BROS. INC. the first chance to operate the same upon terms to be negotiated and agreed upon between the parties. The said PFOHL BROS. INC. shall be given thirty (30) days' written notice of the availability of such gravel deposits. All stripping of overburden shall be done by PFOHL BROS. INC. Sand, grit and gravel shall be sold at not to exceed ten cents (10¢) per ton by said GEORGE C. FREY to PFOHL BROS. INC. In the event that PFOHL BROS. INC. fails to exercise such option, the property in question may be sold to any other person, firm or corporation.

In the event that GEORGE C. FREY shall acquire the property situated on the west side of Pavement Road, and directly across from the Weil farm, then he agrees to give to PFOHL BROS. INC. a right-of-way forty (40) feet in width along the southerly line of the premises retained by GEORGE C. FREY from the Weil farm, said right-of-way to run until the pit is no longer operated commercially.

8. PFOHL BROS. INC. shall make, promulgate and enforce rules requiring all of its employees to keep off the premises hereby leased to GEORGE C. FREY, except while on the business of

LIBER 4518 PAGE 256

Out Aug 19 1953

L 5454 Page 532

PFOHL BROS. INC.

9. GEORGE C. FREY shall make, promulgate and enforce rules requiring all of his employees to keep off the premises purchased by PFOHL BROS. INC. not covered by the lease to GEORGE C. FREY, except while on the business of GEORGE C. FREY.

10. In the event that GEORGE C. FREY, his heirs at law, legal representatives, successors or assigns, shall decide to discontinue or sell the ready mix concrete business or butcher plant under this agreement and to sell the portable portions thereof, and the machinery, equipment, trucks and appurtenances used in connection with the operation thereof, notice in writing to that effect, stating the price, terms and conditions upon which such property will be sold and conveyed shall be given to PFOHL BROS. INC., by registered mail, and the said PFOHL BROS. INC. shall have thirty (30) days from the receipt of such notice in which to purchase said butcher plant, together with the machinery, equipment and appurtenances thereof, and the trucks used in and about the operation thereof, upon the terms and conditions and for the price stated in such written notice.

If PFOHL BROS. INC. shall not exercise the option to purchase said plant and its equipment, etc., as hereinbefore provided within thirty (30) days from the receipt of such written notice, GEORGE C. FREY, his heirs, legal representatives, successors or assigns, may offer the said plant and its equipment for sale to the public. However, if said plant is not operated for a period of at least one (1) year without a sufficient and proper reason being shown to the satisfaction of PFOHL BROS. INC., said PFOHL BROS. INC. may, by registered mail addressed to GEORGE C. FREY or his legal representatives, at "illiam Street, R.F.D. #2, Lancaster, N. Y.", or to his successors or assigns at their addresses, order the plant removed in six (6) months if no just cause or reason can be given for failing to operate the same. If such plant shall be removed, however, the retaining walls, found-

liber 4518 page 257

ations and wells thereof shall not be disturbed. However, said GEORGE C. FREY may remove the roadway or ramp from the retaining wall to the plant, and any steel beams which may be welded to the retaining wall may be likewise removed.

11. The said PFOHL BROS. INC. agree to furnish to GEORGE C. FREY for the use in his butcher plant located upon the premises herein described, sand, grit and gravel as he may require from any pit or property which they now or hereafter own, lease or operate located in the County of Erie, at the pit price delivered in the bins at the butcher plant herein described, less discounts hereinafter mentioned.

In the event that said GEORGE C. FREY desires to expand the butcher plant facilities herein referred to, PFOHL BROS. INC. will cooperate to the fullest extent and, if necessary, at the option of the said GEORGE C. FREY, include a new location at any other pit or washing plant owned, leased or operated by said PFOHL BROS. INC. However, any new crushed stone butcher plant at a site on any premises now or hereafter owned, leased or operated by PFOHL BROS. INC. other than at Pavement and Peppermint Roads, Town of Lancaster, New York, shall be covered by a new agreement between the parties.

12. This lease shall inure to the benefit of the heirs, representatives, administrators, executors, successors and assigns of the said GEORGE C. FREY, and may be assigned by him or them, or sublet in whole or in part at any time during the term thereof or the term of any renewal thereof.

13. PFOHL BROS. INC. has agreed and does hereby agree to sell and deliver, during the term of this contract, to GEORGE C. FREY, and to his heirs at law, legal representatives, successors and assigns, at the butcher plant on the premises purchased by PFOHL BROS. INC., at Pavement and Peppermint Roads, in the Town of Lancaster, or such other plant or plants as may replace it, washed and screened concrete sand, grit and gravel from the said pits. The sand and grit, referred to in this agree-

Liber 4518 PAGE 258

ment, shall pass through a screen with a one-quarter inch mesh, or opening, and the gravel shall be of two sizes, one of which sizes shall pass through a screen with a mesh or opening one-half inch in size and shall be retained on a screen with quarter inch mesh or openings, and the other size shall pass through a screen with a mesh or opening one and one-half inches in size and be retained on a screen having a mesh or opening one-half inch in size, for the prices and upon the terms which shall be agreed to annually by the parties hereto and set out on a written schedule signed by both parties to this agreement.

The said PFOHL BROS. INC. agrees to furnish to GEORGE C. FREY, his heirs at law, legal representatives, successors and assigns, such grades of sand, grit and gravel as he may require for the operation of his business.

Exhaustion of suitable material for concrete mix at all pits owned, leased or operated by PFOHL BROS. INC. shall terminate this contract. Exhaustion shall mean lack of sand, grit and gravel in commercial quantities after suitable and thorough exploration of the properties.

14. GEORGE C. FREY, in consideration of the granting of the privilege to operate a ready mix batcher plant on the premises purchased by PFOHL BROS. INC., shall use sand, grit and gravel from the pits of PFOHL BROS. INC., exclusively, in preparing and manufacturing his concrete batches, except as herein otherwise provided.

If, however, GEORGE C. FREY, or his heirs at law, legal representatives, successors and assigns shall obtain an order for concrete aggregate in which crushed stone, sand and grits are the component parts, GEORGE C. FREY may purchase crushed stone, sand and grits elsewhere and use the same in his concrete aggregate.

15. PFOHL BROS. INC. shall keep the batcher bins of GEORGE C. FREY'S batcher plant filled with sand, grit and gravel as may be required from its pits at all times during the term of

this contract, subject to the conditions and limitations expressed therein. PFOHL BROS. INC. shall keep a stock pile of approximately 7500 tons of material on hand for use in the batcher plant of GEORGE C. FREY.

It is understood and agreed that PFOHL BROS. INC. shall not be liable for any failure, loss, or damage caused by, or arising out of, fires, strikes, flood, war, public disorder, lawless actions, rioting, epidemics, cave-ins or causes beyond its control. While PFOHL BROS. INC. is unable to deliver sand or gravel because of any of said causes, however, GEORGE C. FREY may procure sand, grit and gravel elsewhere for use in mixing his aggregate.

16. All prices fixed under this contract include the cost of delivery of sand, grit and gravel.

17. Prices for sand, grit and gravel to be furnished by PFOHL BROS. INC. to GEORGE C. FREY and purchased by GEORGE C. FREY hereunder, shall be adjusted and fixed on a separate written schedule by mutual agreement once each year as of April 1st during the term of this contract and shall remain in effect for a period of one (1) year thereafter, unless modified in writing by mutual agreement.

Prices are to be prevailing pit prices, less twenty per cent (20%). Two per cent (2%) discount will be allowed if bills for previous month are paid on or before the 10th day of the following month.

If any party to this contract shall desire that a change or revision be made in the prices of sand, grit or gravel to be sold and delivered under this agreement effective on and after the 1st day of the following April, such party shall give written notice by registered mail of his request for such change of prices, at least sixty (60) days prior to such first day of the following April. Changes or revisions can only be made to conform with prevailing pit prices.

18. This contract shall be binding in all respects on the successors and assigns of PFOHL BROS. INC.

LIBER 4518 PAGE 259

LIBER 4518 PAGE 200

19. This contract shall become effective on June 1, 1949, or at such later time as title to the premises may pass to PFOHL BROS. INC., and shall continue for a term of fifteen (15) years unless sooner terminated by mutual consent, with the privilege reserved to GEORGE C. FREY to renew the said lease upon the same terms, by notice in writing of his option to do so by registered mail addressed to PFOHL BROS. INC., at Pfohl Road, Cheektowaga, New York, or to their successors and assigns, not less than ninety (90) days prior to the termination of the fifteen (15) years provided herein.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed by GEORGE C. FREY under his hand and seal, and by PFOHL BROS. INC., under the hand of its President, thereunto duly authorized, and its corporate seal, the day and year hereinbefore first written.

George C. Frey (L.S.)
GEORGE C. FREY

(SEAL)

PFOHL BROS. INC.
by:
Paul V. Pfohl
PAUL V. PFOHL, President

STATE OF NEW YORK)
COUNTY OF ERIE) SS.
VILLAGE OF DEPEW

On this 17th day of May, 1949, before me, the subscriber, personally came GEORGE C. FREY, to me personally known, and known to me to be the same person described in and who executed the within instrument, and he duly acknowledged to me that he executed the same.

Harold P. Kelly
HAROLD P. KELLY
NOTARY PUBLIC
In and for the County, New York.
My Commission Expires March 30, 19..

STATE OF NEW YORK)
COUNTY OF ERIE) SS.
VILLAGE OF DEPEW)

On this 17th day of May, 1949, before me personally came PAUL M. PFOHL, to me personally known who, being by me duly sworn, did depose and say that he resides in the Town of Cheektowaga; that he is the President of PFOHL BROS. INC., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Harold P. Kelly

HAROLD P. KELLY
NOTARY PUBLIC
In and for Erie County, New York
My Commission Expires March 30, 19..

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Plaintiffs' Motion for Separate Trials.

PFOHL BROS. INC.

WASHED SAND and GRAVEL

OFFICE:
PFOHL ROAD
BUFFALO 21, N. Y.
PHONE: PL 1020

PLANT:
PEPPERMINT AND PAVEMENT ROADS
LANCASTER, N. Y.

January 29, 1953

George C. Frey
5393 William Street
Lancaster, New York

Dear Mr. Frey,

As per our agreement, please be notified that we request an increase in price, on or before April 1st.

Very truly yours,

PFOHL BROS., INC.

Joseph Pfohl
Secretary-Treasurer

JP/E

Plaintiffs' Motion for Separate Trials.

PFOHL BROS., Inc. WASHED SAND AND GRAVEL

OFFICE • 150 PFOHL ROAD • BUFFALO 25, NEW YORK
PHONE: PL 1020
PLANT • PEPPERMINT AND PAVEMENT RDS. • LANCASTER, N. Y.
PHONE: RE 2433

April 14, 1953

Mr. George C. Frey
5393 William Street
Lancaster, New York

Dear Mr. Frey,

Pursuant to your request, we hereby advise you that at a meeting with you on or about the middle of February 1953, the prices for sand and gravel for the year beginning April 1, 1953, were made by mutual agreement with you, to be increased from $0.95 per ton less 2% cash discount, to $1.05½ per ton, less 2% cash discount, i.e., this price was fixed after giving you all discounts, and we are to receive for each ton of both sand and gravel, the sum of $1.05½ per ton.

As you will recall, at our meeting you requested that a uniform price be made for sand and gravel to facilitate bookkeeping on your part, as well as bookkeeping on our part.

Very truly yours,

PFOHL BROS., INC.

Joseph Pfohl

Joseph Pfohl
Secretary-Treasurer

JP/m

PHONE: REgent 143

GEORGE C. FREY
Bleaching Plant, Inc.
5393 WILLIAM STREET — LANCASTER, N. Y.

September 3, 1953

[illegible] Dyeing, Inc.,
[illegible] Road
Chattanooga, N. Y.

Gentlemen:

This is to confirm our agreement and understanding of August 29, 1953.

It is understood and agreed that although prices for materials delivered and sold by you to George C. Frey Bleaching Plant, Inc., are currently adjusted on April 1st of each year, that your costs of operations may make it necessary to increase your price to other customers. Accordingly, it is agreed that in the instance the price of materials sold to all other buyers by 20% per ton or more George C. Frey Bleaching Plant, Inc. will pay you 5% per ton more than it is paying as of the above date.

This agreement shall become effective upon your giving us notice of the effective date of the aforementioned price rise to other buyers.

If you raise the price to other buyers by any sum less than the aforementioned ten per ton this price rise shall be null and void and the agreement will be renewed for any price increase to be paid by us.

Very truly yours,

GEORGE C. FREY BLEACHING PLANT, INC.

By [signature] George C. Frey, Pres.
George C. Frey, President.

Plaintiffs' Motion for Separate Trials.

PFOHL BROS., Inc. WASHED SAND AND GRAVEL
OFFICE • 153 PFOHL ROAD • BUFFALO 25, NEW YORK
PHONE: PL 1020
PLANT • PEPPERMINT AND PAVEMENT RDS. • LANCASTER, N. Y.
PHONE: RE 2483

August 28, 1953

George C. Frey
5393 William Street
Lancaster, New York

Dear Mr. Frey,

Effective the first of September, our pit price on Washed Material will be increased to $1.50 per ton.

Very truly yours,

PFOHL BROS., INC.

Joseph Pfohl
Secretary-Treasurer

JP/m

Plaintiffs' Motion for Separate Trials.

PFOHL BROS., INC. WASHED SAND AND GRAVEL
OFFICE • 100 PFOHL ROAD • BUFFALO 25, NEW YORK
PHONE: PL 1020
PLANT • PEPPERMINT AND PAVEMENT RDS. • LANCASTER, N. Y.
PHONE: RE 2403

January 11, 1954

George C. Frey
5393 William Street
Lancaster, New York

Dear Mr. Frey,

As per our agreement, please be notified that we request an increase in price, on or before April 1st.

Very truly yours,

PFOHL BROS., INC.

Joseph Pfohl

Joseph Pfohl
Secretary-Treasurer

JP/m

Registered Mail - Return Receipt Requested

Exhibit 6

Plaintiffs' Motion for Separate Trials.

PFOHL BROS. INC. WASHED SAND AND GRAVEL

OFFICE • 165 PFOHL ROAD • BUFFALO 23, NEW YORK
PHONE: PL 1620
PLANT • PEPPERMINT AND PAVEMENT RDS. • LANCASTER, N. Y.
PHONE: RE 2403

March 16, 1954

George C. Frey
5393 William Street
Lancaster, New York

Dear Sir,

Effective April 1, 1954, our Pit Price on Washed Material will be increased to $1.60 per ton.

Very truly yours,

PFOHL BROS., INC.

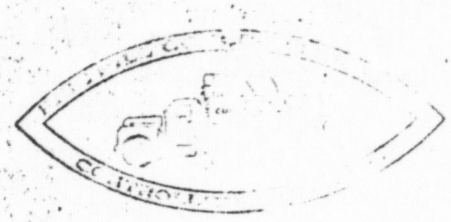
Joseph Pfohl
Secretary-Treasurer

JP/m

Exhibit 7

Plaintiffs' Motion for Separate Trials.

GA 2255-6-7-8



OFFICE AND Y[illegible]
2255 BAILEY AVENUE, [illegible]LO 11, N. Y.

January 23, [illegible]

Mr. George C. Frey
George C. Frey Batching Plant, Inc.
561 Pavement Road
Lancaster, New York

Dear Mr. Frey:

As per our agreement, please be notified that we request an increase in price, on or before April 1, 1958.

Very truly yours,

PINE HILL CONCRETE MIX CORP.

Ludwig F. Kahle
President

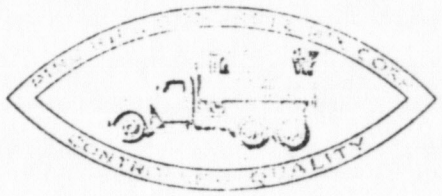
LFK:jce

Certified Mail - Return Receipt Requested

EXHIBIT S

Plaintiffs' Motion for Separate Trials.

PHONE UA 2255-6-7-8



OFFICE AND YARD
2255 BAILEY AVENUE, BUFFALO 11, N. Y.

February 28, 1958

Effective April 1, 1958, our F. O. B. Pit Prices will be:

Washed & Screened Sand --

Asphalt Sand	.....	$2.20	Per Ton
Brick "	.....	2.20	" "
Concrete "	(Grit).....	2.20	" "
Filter "	(To specification).....	2.40	" "
Plaster "	.....	2.20	" "

Washed & Screened Gravel --

Roofing Gravel	(5/16" Top Size).....	2.20	" "
#4 "	(1/2 " " ") if available	2.60	"
#1 "	(9/16" " ") if available	2.60	"
"1 "	(5/8 " " ").....	2.40	" "
#2 "	(1 1/2 " " ").....	2.20	" "
#3 and 4 "	.....	1.80	" "
Bank Run Gravel	.....	.70	"
Fill	.....	1.00	Per Small Load
" "	.....	2.00	" Medium "
" "	.....	3.00	" Large "
Top Soil	.....	1.00	Per Yard

Trucking charges upon request

Pit Locations

324 Pavement Road	Lancaster	-	Re. 6205
Peppermint & Pavement Road	"	-	Re. 2483
Genesee & Shisler Road	"	-	Re. 4224
Wiltse & Shisler Road	Clarence	-	Re. 3419
Stage & Billo Road	Newstead	-	Sp. 8144

Plaintiffs' Motion for Separate Trials.

PHONE: REgent 1432

GEORGE C. FREY

Batching Plant, Inc.

561 PAVEMENT ROAD -:- LANCASTER, N. Y.

March 31, 1933

Mr. [illegible]
[illegible] Concrete Mix Corp.
2222 Delaware Avenue
Buffalo, New York

Dear Sir:

Due to your revised price list, we shall also have to change our bid [illegible] to your list and [illegible] and we are willing to do [illegible] subject to the following conditions:

1. There will be no change in the quotation of the other unit that which the same as they have been prior to this change.

2. If this change does not meet our satisfactory, as per date to will then give you a 30 day notice to change back to a satisfactory extent.

We are enclosing a duplicate copy of this letter, please sign to indicate your acceptance and return to us.

Very truly yours,

Herbert C. Frey,
Vice President

HCF:alb
Encl. 1

EXHIBIT 9

Plaintiffs' Motion for Separate Trials.

PHONE: BA 2255-6-7-8

PINE HILL CONCRETE MIX CORP.
CONTROLLED QUALITY

OFFICE AND YARD
2255 BAILEY AVENUE, BUFFALO 11, N. Y.

FEBRUARY 6, 1968

GEORGE C. FREY
561 PAVEMENT ROAD
LANCASTER, NEW YORK 14086

DEAR SIR:

ENCLOSED IS OUR PRICE LIST EFFECTIVE APRIL 1, 1968. YOU WILL, OF COURSE, BE ALLOWED 20% AND 2% DISCOUNT FROM THE PRICES AS SHOWN ON THE ENCLOSED LIST.

SINCERELY,

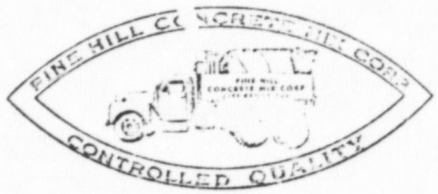
THOMAS D. SHIPSTON
OFFICE MANAGER

TDS:kz
ENC.

EXHIBIT 10

Plaintiffs' Motion for Separate Trials.

PHONE: BA 2255-6-7-8



OFFICE AND YARD

2255 BAILEY AVENUE, BUFFALO 11, N. Y.

JANUARY 31, 1968

PRICE LIST - F. O. B. PIT - EFFECTIVE APRIL 1, 1968

WASHED & SCREENED SAND

ASPHALT SAND	$2.50	PER TON
BRICK "	2.50	" "
CONCRETE "	3.20	" "
PLASTER "	3.20	" "
FILTER " *	*3.50	" "

WASHED & SCREENED GRAVEL--

#1A ROOFING GRAVEL..(1/4" TOP SIZE)	$2.50	PER TON
" " ..(5/16" " ")	2.50	" "
" " ..(3/8" " ")*	2.50	" "
X #1 " ..(5/8" " ")	2.50	" "
X #2 " ..(1 1/4"" ")	2.30	" "
#3 & #4 "	2.00	" "

BANK RUN GRAVEL OR BANK RUN SAND.....	*	$ .70	PER TON
-4" CRUSHED BANK RUN (ITEMS 3 OR 3x)	*	1.20	" "
-3" " " " (ITEM 2 EFB)	*	1.20	" "
-2" " " " (ITEMS 2EFBx OR ITEM 4)	*	1.40	" "
-1" " " "	*	1.40	" "
-3/4" " " "	*	1.40	" "
DIRT FILL - $1.00-2.00-3.00 PER LOAD	*	ACCORDING TO SIZE	
TOP SOIL	*	1.00	PER YARD
LEACH BED FILL.....	*	1.00	" "

* IF AVAILABLE

TRUCKING CAN BE ARRANGED, CHARGES UPON REQUEST.

PIT LOCATIONS

SAND & GRAVEL	324 PAVEMENT RD.	LANCASTER	683-6705
SAND & GRAVEL	PAVEMENT & PEPPERMINT	"	683-2483
SAND & GRAVEL	GENESEE & SHISLER	"	683-4224
BANK RUN GRAVEL, SAND, & FILL	JONES & RANSOM	"	759-8189

Plaintiffs' Motion for Separate Trials.

March 27, 1950

Mr. Thomas C. Shipston
Pine Hill Concrete Mix Corporation
2000 Dailey Avenue
Buffalo, New York

Dear Mr. Shipston:

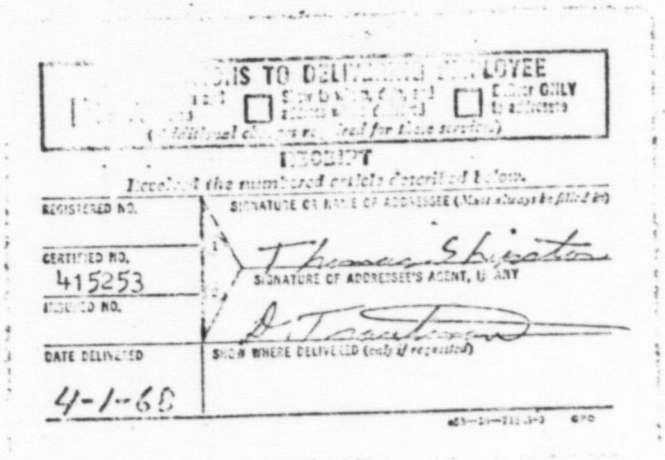
In reference to your registered letter received February 7, 1950, we will not honor your price increase. The 60 day notification clause in our agreement dated May 17, 1949 was not complied with. However, when Mr. George C. Tracy is home, maybe some reasonable understanding can be reached when Mr. Ludwig F. Kullo meets with him.

Very truly yours,

[illegible] Tracy, Vice President
George C. Tracy Ready Mixed Concrete, Inc.

MT:ch

EXHIBIT 11

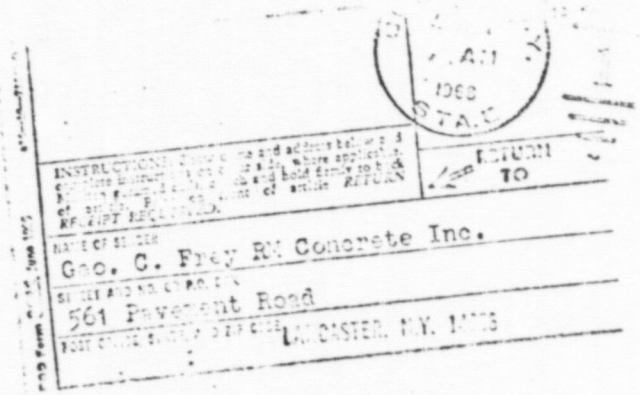


INSTRUCTIONS TO DELIVERING EMPLOYEE
Deliver ONLY to addressee
(Additional charges required for these services)

RECEIPT
Received the numbered article described below.

REGISTERED NO. | SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)
CERTIFIED NO. 415253 | Thomas G. Shipston
INSURED NO. | SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
DATE DELIVERED 4-1-66 | SHOW WHERE DELIVERED (only if requested)

1. Stick postage stamps to your article to pay
BASIC CHARGES
Certified fee—30¢
Postage (first-class or airmail)
OPTIONAL SERVICES
Return receipt (10¢ or 35¢)
Deliver to addressee only—50¢
Special delivery
2. If you want this receipt postmarked, stick the gummed stub on the left portion of the address side of the article, *leaving the receipt attached*, and present the article at a post office service window or hand it to your rural carrier. (No extra charge)
3. If you do not want this receipt postmarked, stick the gummed stub on the left portion of the address side of the article, detach and retain the receipt, and mail the article.
4. If you want a return receipt, write the certified mail number and your name and address on a return receipt card, Form 3811, and attach it to the back of the article by means of the gummed ends. Endorse front of article RETURN RECEIPT REQUESTED. (Fee—10¢)
5. If you want the article delivered only to the addressee, endorse it on the front DELIVER TO ADDRESSEE ONLY (Fee—35¢) Place the same endorsement on line 2 of the return receipt card.
6. Save this receipt and present it if you make inquiry.



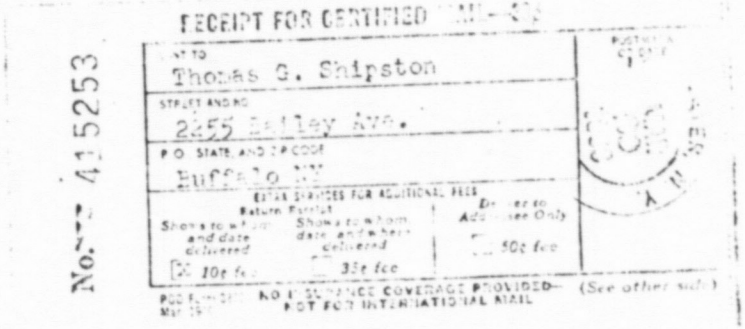
INSTRUCTIONS: Print your name and address below the return address on the article, where applicable, and fold firmly to the left of the article. RETURN RECEIPT REQUESTED.

RETURN TO

NAME OF SENDER
Geo. C. Frey Rd Concrete Inc.

STREET AND NO. OR P.O. BOX
561 Pavement Road

POST OFFICE, STATE AND ZIP CODE
LANCASTER, N.Y. 14086



No. 415253

RECEIPT FOR CERTIFIED MAIL—NO INSURANCE

SENT TO
Thomas G. Shipston

STREET AND NO.
2455 Bailey Ave.

P.O. STATE AND ZIP CODE
Buffalo N.Y.

EXTRA SERVICES FOR ADDITIONAL FEE
Return Receipt
Shows to whom and date delivered ☐ 10¢ fee
Shows to whom, date, and where delivered ☐ 35¢ fee
Deliver to Addressee Only ☐ 50¢ fee

POSTMARK OR DATE

NO INSURANCE COVERAGE PROVIDED—NOT FOR INTERNATIONAL MAIL (See other side)

Plaintiffs' Motion for Separate Trials.

May 9, 1968

Pine Hill Concrete Mix Corp.
2255 Bailey Avenue
Buffalo, New York

Attention: Ludwig Kahle

Dear Mr. Kahle;

With reference to our letter May 27, 1968. I am now home and I would appreciate it if you would call and let me know when and where you would be available for a meeting.

Very truly yours,

George C. Frey
President

GEORGE C. FREY
BATCHING PLANT, INC.

GCF:ldk

EXHIBIT 12

PHONE. REgent 1432

GEORGE C. FREY

Hatching Plant, Inc.

561 PAVEMENT ROAD -:- LANCASTER, N. Y.

November 4, 1963.

Pfohl Bros., Inc.
Pfohl Road
Cheektowaga 25, New York

Gentlemen:

Pursuant to the terms of the Lease and Agreement dated May 17th, 1949, between George C. Frey and Pfohl Bros., Inc., recorded in the Erie County Clerk's Office in liber 4518 of deeds at page 251, I do hereby notify you that I am exercising the privilege to renew said Lease upon the same terms for an additional term of fifteen years, said additional term of fifteen years to commence on the date of the expiration set forth in the original Lease before referred to.

Yours very truly,

GEORGE C. FREY

CC: Pine Hill Concrete Mix Corp.

EXHIBIT 13

No. 723281

RECEIPT FOR CERTIFIED MAIL

LANCASTER PA DEC 21 1963

RESTRICTIONS TO DELIVERING EMPLOYEE

RECEIPT

Received the numbered article described on other side.

SIGNATURE OR NAME OF ADDRESSEE (must always be filled in)

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

INSTRUCTIONS

RETURN TO

REGISTERED NO.

CERTIFIED NO. 723281

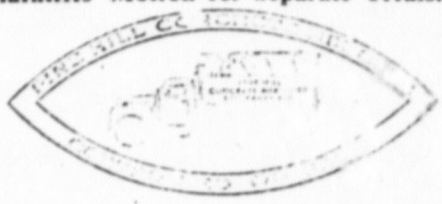
INSURED NO.

POSTMASTER

164bb

Plaintiffs' Motion for Separate Trials.

164cc
Plaintiffs' Motion for Separate Trials.



OFFICE AND YARD
2255 BAILEY AVENUE, BUFFALO 11, N. Y.

January 13, 1969

George C. Frey Ready Mixed Concrete Inc.
561 Pavement Road
Lancaster, New York 14086

Gentlemen:

On February 6, 1968 we notified you that the prices of our products delivered to your bins on Peppermint Road, [illegible] of Lancaster would be increased effective April 1, 1968 according to the price list we sent to you. Since then we have continually billed you monthly to reflect the increased prices, which you have refused to pay.

As a result of your refusal to pay, we are hereby notifying you that no deliveries will be made on or after February 1, 1969 until you pay the sum on your open account.

Sincerely yours,
PINE HILL CONCRETE MIX CORP.

T. D. Shipston
Office Manager

P.S. The prices billed to you were the prevailing pit prices.

EXHIBIT 14

164dd
Plaintiffs' Motion for Separate Trials.

PHONE GA 2255-6-7-8

PINE HILL CONCRETE MIX CORP.
CONTROLLED QUALITY

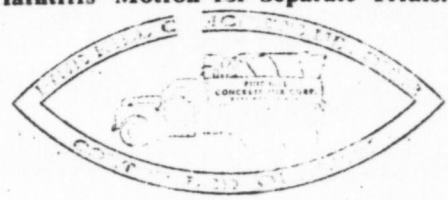
OFFICE AND YARD
2255 BAILEY AVENUE, BUFFALO 11, N. Y.

January 14, 1969

GEORGE C. FREY READY MIX CONCRETE INC.

		Earned Disc. 2%	Paid	Disc. Taken
4/15	9,822.72	196.45	7,661.29	2,161.43
4/30	11,369.32	227.39	8,863.57	2,505.75
5/15	14,383.70	287.67	11,161.80	3,221.90
5/31	10,663.60	213.27	8,297.98	2,365.62
6/15	13,339.27	266.79	10,372.43	2,966.84
6/30	8,731.64	174.63	6,705.88	2,025.76
7/15	12,014.14	240.28	9,242.13	2,772.01
7/31	12,043.50	240.87	9,243.71	2,799.79
8/15	9,889.22	197.78	7,619.38	2,269.84
8/31	11,331.77	226.64	8,720.21	2,611.56
9/15	7,499.76	150.00	5,729.46	1,770.30
9/30	13,921.16	278.42	10,624.81	3,296.35
10/15	11,616.19	232.32	8,914.52	2,701.67
10/31	11,965.60	239.31	9,189.94	2,775.66
11/15	6,932.48	138.65	5,323.20	1,609.28
11/30	5,861.36	117.34	4,491.23	1,370.13
12/15	4,257.97	85.16	3,266.93	991.04
12/30	5,606.03	112.12	4,332.37	1,273.66
	181,149.43	3,623.09	139,760.04	41,389.39
		Earned Discount		3,623.09
		Balance Due 12/31/68		37,766.30

PHONE: FR. 5255-6-7-8



OFFICE AND YARD
2255 BAILEY AVENUE, BUFFALO 11, N. Y.

JANUARY 27TH, 1969

GEORGE C. FREY READY MIXED CONCRETE, INC.
501 PAVEMENT ROAD
LANCASTER, NEW YORK 14086

GENTLEMEN:

AS YOU KNOW, WE NOTIFIED YOU BY LETTER DATED JANUARY 13, 1969 THAT WE WILL NOT SUPPLY YOU WITH ANY MORE MATERIALS AT YOUR PLANT ON OR AFTER FEBRUARY 1, 1969 UNLESS ALL OUTSTANDING BILLS ARE PAID. TO DATE YOU STILL REFUSE TO PAY THESE BILLS AND WE ARE RE-AFFIRMING OUR INTENTION TO STOP SELLING TO YOU.

PLEASE BE FURTHER ADVISED, THAT IN THE EVENT YOU PAY YOUR BILLS AS AFORESAID AND WISH TO PURCHASE MATERIALS FROM US, THE PRICE IN EFFECT WILL BE THE SAME AS THOSE SENT YOU ON FEBRUARY 5, 1968. NO DELIVERY TO YOUR PLANT WILL BE INCLUDED IN THESE PRICES.

ENCLOSED IS A COPY OF THIS PRICE LIST.

VERY TRULY YOURS,
PINE HILL CONCRETE MIX CORP.

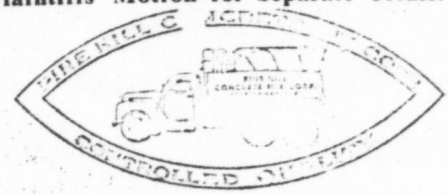
Thomas D. Shipston

THOMAS D. SHIPSTON
OFFICE MANAGER

KR
ENC.

EXHIBIT 15

PHONE: GA 2255-6-7-8



OFFICE AND YARD

2255 BAILEY AVENUE, BUFFALO 11, N. Y.

JANUARY 31, 1968

PRICE LIST - F. O. B. PIT - EFFECTIVE MARCH 1, 1968

WASHED & SCREENED SAND--

ASPHALT SAND	$2.50	PER TON
BRICK "	2.50	" "
CONCRETE "	3.20	" "
PLASTER "	3.20	" "
FILTER " *	* 3.50	" "

WASHED & SCREENED GRAVEL--

#1A ROOFING GRAVEL..(1/4" TOP SIZE)		$2.50	PER TON
" " ..(5/16" " ")		2.50	" "
" " ..(3/8" " ")	*	2.50	" "
#1 " ..(5/8" " ")		2.50	" "
#2 " ..(1 1/4"" ")		2.30	" "
#3 & #4 "		2.00	" "

BANK RUN GRAVEL OR BANK RUN SAND.....	*	$ .70	PER TON
-4" CRUSHED BANK RUN (Items 3 or 3x)	*	1.20	" "
-3" " " " (Items 2 EFB)	*	1.20	" "
-2" " " " (Items 2 EFBx or Item 4)	*	1.40	" "
-1" " " "	*	1.40	" "
-3/4" " " "	*	1.40	" "

DIRT FILL - $1.00-2.00-3.00 PER LOAD	*	ACCORDING TO SIZE
TOP SOIL.....	*	$1.00 PER YARD
LEACH BED FILL.....	*	1.00 " "

* IF AVAILABLE

TRUCKING CAN BE ARRANGED, CHARGES UPON REQUEST.

PIT LOCATIONS

SAND & GRAVEL	324 PAVEMENT RD.	LANCASTER	683-6263
SAND & GRAVEL	PAVEMENT & PEPPERMINT	LANCASTER	683-2463
SAND & GRAVEL	GENESEE & SHISLER	LANCASTER	683-4224
BANK RUN GRAVEL, SAND, & FILL	JONES & RANSOM	LANCASTER	759-6189

Plaintiffs' Motion for Separate Trials.

January 29, 1969

Pine Hill Concrete Mix Corp.
2255 Bailey Avenue
Buffalo, New York 14211

Gentlemen:

In response to your letter of January 13, 1969 it is apparent that you have elected to breach the terms of the contract by your stated refusal to make deliveries of your product after February 1, 1969.

You are hereby advised that in view of the position you have taken we are compelled to purchase our material requirements in the open market and as a result we will necessarily look to you for any consequential damages which may follow.

Very truly yours,

/s/ Muck

(Mrs.) Lois Muck
Sec. & Treas.

GEORGE C. FREY
BATCHING PLANT, INC.

LM:jmk
cc: Pfohl Brothers, Inc.
Pfohl Road
Cheektowaga, New York

EXHIBIT 16

Supporting Affidavit of Herbert G. Frey.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

Civil No. 1970-277

vs.

AFFIDAVIT OF HERBERT G. FREY

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

STATE OF NEW YORK:
COUNTY OF E R I E: ss
CITY OF BUFFALO:

HERBERT G. FREY, being duly sworn, deposes and says:

1. I am President of the plaintiff corporations George C. Frey Ready-Mixed Concrete, Inc. and George C. Frey Batching Plant, Inc., and one of the co-executors of the Estate of my deceased father George C. Frey who was the founder of said corporations and their ready-mixed concrete business.

2. I have been President of the plaintiff corporations for approximately 4 years and prior thereto I was Vice Preisent which position I held for approximately 18 years.

3. I am the General Manager of the ready-mixed businesses of the plaintiff corporations and am in full active and daily charge thereof and familiar with the circumstances thereof.

4. From 1949 thru 1968, we purchased all of our requirements of gravel from the defendants Pfohl pursuant to a 30-year Agreement dated May 17, 1948 (annexed as Exhibit 1, and hereafter referred to as "Agreement"), a gravel plant, pit and premises, including the property on which our concrete batching plant was located, in the Town of Lancaster. Defendants Pfohl in turn agreed to deliver to the hoppers at our batching plant, our entire requirements of concrete grit and gravel, at a special price to be fixed by mutual agreement between us from time to time. This price was a delivered price and was subject to a 20% discount plus a 2% cash discount, or a total discount of 21.6%.

5. The purpose of this Agreement was to give us an assured wholesale supply of gravel, delivered to our batching plant, for a period of 30 years so as to enable us to effectively compete with Pine Hill and the other ready-mixed concrete companies in the area as though we had a gravel source and plant of our own. In turn, we agreed not to operate a gravel plant in Erie County.

Supporting Affidavit of Herbert G. Frey.

6. From 1949 thru 1957, Pfohl Brothers, Inc. supplied us with our requirements of gravel, delivered the gravel to our concrete batch-plant hoppers, and charged us the wholesale price which was mutually agreed upon, all pursuant to said Agreement. If they desired a price increase, they gave us a timely request for an increase in price, following which conferences took place, and during which mutual agreement was reached concerning the wholesale price which would prevail for the gravel in the future. No price increase was put into effect unilaterally or automatically, but only as the result of "mutual agreement" between the Pfohls and the Freys. These mutually agreed prices were not necessarily the prevailing, pit or published list prices.

7. For example, on January 29, 1953 Pfohl requested an increase in price by April 1st. A meeting was held in the middle of February in which "the prices for sand and gravel for the year beginning April 1, 1953 were made by mutual agreement" and increased from $1.185 per ton to $1.31875 per ton less 20%, (or from 95¢ to $1.055 per ton after the 20%), all less the 2% cash discount. These prices were lower than the published list prices at which Pfohl sold gravel to the trade (see annexed Exhibits 2 and 3).

8. In August 1953 Pfohl requested a further increase. A meeting was held at which it was mutually agreed as follows:

A. If Pfohl increased its published list price by 10¢ per ton, Frey's mutually agreed price would be increased 5¢ per ton.

B. If Pfohl increased its published list price by more than 10¢ per ton (which it did), the increase in Frey's mutually agreed price would be limited to 5¢ per ton.

C. If Pfohl increased its published list prices by less than 10¢ per ton, Frey would not pay any additional sum unless mutually agreed upon by further negotiations (see annexed Exhibit 4).

9. Pfohl thereupon proceeded to increase its published list prices by 15¢ per ton. Frey's increase was limited to 5¢ per ton. Thus, regular customers were paying $1.50 per ton f.o.b. Pfohl's plant; whereas Frey was paying $1.36875 per ton less 20% (or $1.105 after the 20%), less 2%, delivered to Frey's batch plant hoppers (see Exhibit 5 annexed).

10. Thereafter Pfohl gave timely notices of any requests for price increases well before February 1st of each year. These were followed by conferences between the Freys and Pfohls at which a mutual agreement was reached as to the prices to be charged for the future:

Supporting Affidavit of Herbert G. Frey.

A. In 1954 a request was made on January 11 and a mutual agreement was reached on March 16 (see annexed Exhibits 6 and 7).

B. In 1956 a request was made on January 16th.

C. In 1957 a request was made on November 26, 1956 and January 17, 1957.

11. The defendants Pfohl supplied us with our requirements of gravel in accordance with the Agreement from 1949 thru 1957 when they sold out to our principal competitor, the defendant Pine Hill in August 1957.

12. Defendant Pine Hill purported to sell the Pfohl property to the defendant Regent Sand & Gravel Corp. on August 31, 1957. The date of this sale is a controverted and highly questionable date for the following reasons: Pine Hill purchased Pfohl's business on August 1, 1957, and the deed from Pfohl to Pine Hill was dated August 31, 1957. However, 12 years later, namely, on February 11 and May 1, 1969, defendant Pine Hill purported to record deeds ostensibly dated August 31, 1957 which purported to reflect some type of a belated conveyance from Pfohl to defendant Regent.

Supporting Affidavit of Herbert G. Frey.

13. When Pine Hill, our major Ready-Mix competitor, bought out Pfohl in 1957, Pine Hill not only bought our gravel supply Agreement and our gravel processing plant, but they also bought the land on which our batching plant sits which we had also sold to Pfohl in 1949. Additionally, however, Pine Hill also bought all of Pfohl gravel lands in this area which constitute, to deponent's best available knowledge, almost all of the gravel sources in this area.

14. These gravel sources which Pine Hill bought from Pfohl in 1957 were to a large extent acquired by Pfohl with the aid and help of plaintiffs, and my father, who down through the years worked together with Pfohl to locate, acquire and finance these gravel sources.

15. Considering defendants' already existing gravel sources, the acquisition of all of Pfohls' gravel sources, and our gravel supply Agreement and gravel plant, Pine Hill's monopolistic intent must be presumed.

16. When Pine Hill took over as our gravel supplier, Pine Hill initially gave us timely notice of price increases. On January 23, 1958 Pine Hill sent us "a request" for a price increase, and by March 31, 1958 a mutual agreement was reached on the price change (see annexed Exhibits 8 and 9).

Supporting Affidavit of Herbert G. Frey.

17. However, in 1968 a radical departure was instituted by Pine Hill. Pine Hill did not follow Pfohls' and their own previous practice of submitting a timely "request" (before February 1st) for a price increase, to be followed by negotiations and mutual agreement. Instead Pine Hill gave notice of a unilateral increase on February 6, 1968, when it sent Frey its new prices on a "take-it or leave-it" basis (see annexed Exhibit 10).

18. The Freys attempted on numerous occasions to meet with the defendants Pine Hill and Kahle to have negotiations and attempt to reach a mutual agreement on the Frey prices as required by the Agreement. The Freys sent letters on March 27 and May 9, 1968 to attempt to set up a meeting with defendant Kahle, the President of Pine Hill. We made numerous attempts through employees to meet with Mr. Kahle in order to have negotiations and reach a mutual agreement (see annexed Exhibits 11 and 12).

19. Despite all our efforts, defendant Kahle refused to meet with plaintiffs. Finally, defendant Kahle did agree to be present at a meeting with the Freys and the meeting was set up. When we arrived at the meeting, we found that the defendant Ludwig Kahle was not present but instead Mr. Kahle's son Mark was present with Mr. Norman Moran. Mr. Moran stated: "You do not have a contract. You only renewed the lease. You did not renew the contract. Therefore, you do not have a contract with us". Accordingly, there were no negotiations as required by the Agreement.

20. This was the first time that defendants had made this claim. Defendants Pine Hill had honored the renewal and sold us under the Agreement from 1957 when they bought out Pfohl to 1968, which included the 4 years from 1964, when they claim the Agreement expired, to 1968.

21. The agreement to which Mr. Moran referred was the 1949 Agreement and lease, which ran for 15 years with a 15-year renewal. We renewed it in 1963 (see annexed Exhibit 13). For some reason defendants claim we renewed the "lease" part but not the "Agreement" part.

22. The foregoing together with the Agreement of May 17, 1949, and the amendments thereto, constitutes the evidence which plaintiffs would bring on a separate and preliminary trial of the issue of whether or not the contract has been breached.

23. In the event that the Court finds that the defendants did not breach said Agreement, the question will then arise as to whether plaintiffs in refusing to pay said unilateral increase breached the contract and if so, whether said breach was a material breach which would cancel the contract and excuse further performance by the defendants.

24. In this regard, deponent states that plaintiffs at no time refused to perform said contract but refused only to pay the unilateral increase in prices which Pine Hill insisted

upon and as to which Pine Hill refused to engage in negotiations or an attempt to reach a mutual Agreement. The amount of this unilateral increase for the year 1968 was $37,766.30.

25. On January 13, 1969 Pine Hill refused to sell plaintiffs further gravel unless said disputed amount was paid and plaintiffs claimed defendants had breached the Agreement (see annexed Exhibits 14, 15 and 16).

26. On January 27, 1969 Pine Hill wrote to plaintiffs and stated that even if plaintiffs would pay the disputed amount, that defendants would no longer honor the Agreement, and that plaintiffs would have to accept defendants' unilateral price increase, without any negotiations or mutual agreement, without any 20% discount, and without any delivery, as called for by the Agreement.

27. Deponent believes that plaintiffs' conduct under these circumstances was reasonable, even if defendants' unilateral price increase could be deemed substantial performance.

28. The foregoing constitutes substantially all of the plaintiffs' proof on the separate contractual issues which plaintiffs request for the first separate trial. Deponent does not believe that defendants have any additional exhibits or evidence, and have been informed that the entire preliminary separate trial would be one day -- or two days at the most.

Supporting Affidavit of Herbert G. Frey.

SECOND SEPARATE TRIAL

29. Defendants believe that the antitrust issues are substantial, and it is defendants' violation of the antitrust laws that are threatening plaintiffs' future existence. By requesting a second and subsequent trial for the antitrust issues, deponent does not intend to minimize their importance. However, it is only by expediting this trial that plaintiffs can survive to recover from defendants on the antitrust issues and to continue in business without interruption. A restoration of the contract requiring defendants to deliver the material to plaintiffs' hoppers at mutually agreed prices, which shall not in any event be higher than published retail pit prices, less plaintiffs' discount, all delivered to plair iffs' hoppers, as required by the agreement of May 17, 1949, wil. insure that plaintiffs will be able to continue in business during the pendency of the involved antitrust issues and will be able to be in a position to survive the outcome of the litigation.

30. Pine Hill's share of the Concrete Ready-Mix business has increased significantly since it purchased in 1957 Pfohl Brothers, Inc., our gravel supplier. It is now threatening to drive us out of the market by its predatory practices.

31. I am informed that the market had been shared equally by Pine Hill which had one-third, our companies which

had one-third, and all other companies which shared one-third. I am informed that as of the present, Pine Hill has approximately 50% of the market which represents a 50% increase of its share of the market since 1967. We have lost approximately 25% of the market and now have about 25% of the market and all of the other concrete producers combined have lost about 25% of the market and now together have about 25% thereof:

	1957-67	1971	% Change
Pine Hill	33.3%	50%	50% Increase
Frey	33.3%	25%	25% Decrease
All Others	33.3%	25%	25% Decrease

32. My sister Lois Muck during her testimony on May 7, 1971 stated that Pine Hill had 60% to 70%, and our company had 30% of the business. What she was indicating was that Pine Hill has twice the business that we do. In other words, between ourselves they have 60-70% and we have 30% of the total business which our two companies, being the largest companies on the market, share. I would approximate that Pine Hill has about 50% of the total market and that we have about 25% of the total market as of the end of 1970. All of the other companies cited in Schedule A of Mr. Moran's affidavit together presently control only about 25% of the business.

33. I believe that Pine Hill's growth was to a large extent due to acquisitions of competitors tending towards a horizontal monopolization, and acquisition of competitors' sources of supply (gravel) tending towards vertical integration and monopolization, and which both tended to restrain and monopolize a line of commerce in Western New York, namely the Concrete Ready-Mix and Gravel business, in violation of the Clayton and Sherman Acts.

34. A list of the acquisitions by Pine Hill of which I am informed are as follows:

1949	Pine Hill incorporated
1950	Pine Hill bought Genesee Ready-Mixed Concrete (ready-mixed concrete plant)
1951	Pine Hill bought Genesee Sand & Gravel (a sand and gravel supplier)
approx. 1951	Pine Hill bought Depew Ready Mix Company (ready-mixed concrete plant)
1954	Pine Hill bought Buffalo Sand Company's Pavement Road Number 1 (sand plant)
1954	Pine Hill bought Buffalo Sand's Sterling Plant Number 2 on Billo Road (sand and gravel plant)
1963	Pine Hill bought Queen City Ready-Mixed Concrete Company (ready-mixed concrete plant)
1957	Pine Hill bought Pfohl Brothers, Inc. Peppermint Road washing plant which serviced Frey's batch plant and Frey's gravel supply Agreement.

Supporting Affidavit of Herbert G. Frey.

1959 Pine Hill bought Pfohl Brothers Plasdell Road Verel plant (ready-mixed concrete plant)

1968 Pine Hill bought approximately 253 acres gravel lands adjoining Frey's Alexander, New York plant

35. Deponent further states that unless this litigation is rapidly progressed and disposed of, plaintiffs will not be able to continue in business because of these wrongful and predatory practices of the defendants in their conduct of their ready-mixed business in competition with plaintiffs' ready-mixed business. Plaintiffs are suffering from defendants' prohibited practices and are at the mercy of the Court. Unless the Court acts, defendants will continue to attempt to drive plaintiffs out of the market and secure a complete monopoly.

36. Therefore, unless a decision is soon forthcoming, defendants' actions may make it academic.

Herbert G. Frey

Herbert G. Frey

Sworn to before me this
7th day of June, 1971.

[illegible]

72

Order of June 9, 1971.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., et al.,

Plaintiffs

-vs-

Civil No. 1970-277

PINE HILL CONCRETE MIX CORP., et al.,

Defendants

APPEARANCES: Raichle, Banning, Weiss & Halpern
(Arnold Weiss, of Counsel)
Buffalo, New York, for the Plaintiffs.

McDonough, Dousberg, McDonough & Deltz
(Charles J. McDonough, of Counsel)
Buffalo, New York, for the Defendants.

On May 7, 1971, after finding that the defendants had failed to comply with a deposition schedule previously made by this court, an order was entered granting certain interim relief and setting out a new timetable for the answering of interrogatories and the taking of depositions. Following that, the attorney for the defendants made an application to the court requesting that the order of May 7 be modified. Following this, the court had meetings with the attorneys for the respective parties on May 14, 21, 28, and June 4, 1971.

The main objection of the defendants to the order of May 7 was to the ordering paragraphs contained on page 3 of that order. The court requested the attorneys for both sides to provide alternative proposals so that, during the pendency of the action, neither the plaintiffs nor the defendants would have undue advantage over the other, that the discovery would proceed promptly, and that this case could be tried as soon as reasonably possible. After considering the proposals made by the attorneys for each side and the affidavits filed with the court, it is

ORDERED that the order of May 7, 1971 be amended in the following respects: That the ordering paragraph on page 3 of the order of May 7 now read as follows:

> "ORDERED that, effective immediately, upon service of a copy of this order and until further order of this court, the defendant PINE HILL be and it hereby is directed to sell and supply to the plaintiffs GEORGE C. FREY READY-MIXED CONCRETE, INC. and/or GEORGE C. FREY BATCHING PLANT, INC. the said plaintiffs' reasonable requirement of concrete sand (grit), No. 1 gravel and No. 2 gravel, at the current retail prices charged by PINE HILL for said materials, to wit:

Concrete sand (grit): $3.50 per ton
No. 1 Gravel (3/8" top size) 3.00 per ton
No. 2 Gravel (1-1/4" top size) 2.75 per ton;

All said prices less twenty percent (20%), and a further two percent (2%) discount if bills for previous month are paid on or before the 10th day of the following month; and all said prices to be f.o.b. into plaintiffs' trucks at PINE HILL's Genesee Street plant in the Town of Lancaster, N.Y. or, if the plaintiffs so elect, PINE HILL shall deliver said materials to the plaintiffs' Peppermint Road Batching Plant."

IT IS FURTHER ORDERED that, if Pine Hill delivers the materials to the plaintiffs' Peppermint Road Batching Plant, there shall be an additional charge of 70¢ per ton, which shall be paid into an escrow account until further order of this court.

IT IS FURTHER ORDERED that the following timetable is established for the conduct of the pretrial proceedings herein:

July 9, 1971 - Defendants to answer plaintiffs' first and second interrogatories.

July 20, 1971 - Defendants to commence their depositions of plaintiffs.

August 16, 1971 - Plaintiffs to commence their depositions of defendants.

At the meetings between counsel, it was agreed that defense counsel would obtain substitute or supplementary counsel to assist him in the necessary pretrial work to be completed in this case.

IT IS FURTHER ORDERED that the pretrial conference in this matter be set for September 20, 1971. The parties shall comply with the pretrial order of this part, copy attached; trial to begin immediately after date of pretrial meeting if case cannot be settled.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: June 9, 1971.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. PREY READY-MIXED CONCRETE, INC., GEORGE C. PREY BATCHING PLANT, INC.; and HERBERT PREY AND LOIS MUCK as Co-Executors of the ESTATE OF GEORGE C. PREY, Deceased

Plaintiffs

vs

PINE HILL CONCRETE MIX CORP.; REGENT SAND & GRAVEL CORP.; LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL, and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, liquidators and receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation; and PFOHL BROTHERS, INC.,

Defendants

CIVIL ACTION.
NO. 1970-277

DEFENDANT PINE HILL CONCRETE MIX CORP., IN ANSWER TO PLAINTIFF's INTERROGATORIES

Defendant PINE HILL CONCRETE MIX CORP., answers the first and second interrogatories served upon it by the plaintiffs, upon information and belief, as follows:

ANSWER TO FIRST INTERROGATORIES

1 (a) PINE HILL CONCRETE MIX CORP.'s principal place of business is 2255 Bailey Avenue, Buffalo, New York; LUDWIG F. KAHLE, President and Treasurer; CARL E. KAHLE, Vice President and CURT G. KAHLE, Secretary;

(b) June 30, 1949;

(c) Objection;

(d) Manufacturing ready mix concrete and mining sand and gravel; 2255 Bailey Avenue, Buffalo, New York, 5636 Transit Road, Depew, New York; 25 Martin Road, Blasdell, New York; 324 Pavement Road, Lancaster, New York; Pepperment and Pavement Roads, Lancaster New York; Genesee and Shisler Road, Lancaster, New York;

(e) LUDWIG F. KAHLE, sole owner; There are no others having an equity or other interest in PINE HILL CONCRETE MIX CORP., other

than creditors in the ordinary course of conducting corporate business;

2. Objection in entirety;

3. Objection in entirety;

4. Yes;

(a) F.O.B.;

(b) Yes;

(c) Objection;

(d) Yes;

(e) Yes;

5. Objection in entirety;

6. No;

7. Yes;

(a) Objection;

(b) Yes;

(c) No; not to defendant's knowledge;

(d) Yes;

(e) Objection;

(f) Yes;

(g) None;

8. No;

9. (a) Western New York;

(b) Clarence Sand & Gravel, Clarence, New York;
Dan Gernatt, Gowanda, New York;
Frey Sand & Gravel, Buffalo, New York;
Buffalo Gravel (Buffalo Slag Co.), Franklinville, New York;
Olean Sand & Gravel, Olean, New York;
Elmira Transit Mix, Western, New York;
Erie Sand & Gravel Lake Sand; Western New York;
Western New York Sand & Gravel & Ready Mix, Western New York;

(c) None;

(d) Objection;

(e) PROPERTIES AS SOURCE OF SUPPLY:

Fidinger, East of Billo Road, Lancaster, N.Y.
Hoffman, South of Hiller Rd., Newstead, N.Y.
Lancaster-Steger, Jones Rd., Clarence, N.Y.
Duttweiler, Henry, East of Billo Rd., Newstead, N.Y.
Bertha Sugg, South of Hiller Rd., Newstead, N.Y.

WASHING PLANTS:

324 Pavement Rd., Lancaster, New York
Peppermint and Pavements Rd., Lancaster, New York;
Genesee and Shisler Road, Lancaster, New York;
Stage and Billo Road, Newstead, New York;

10. (a) Western New York;

(b) Clarence Sand & Gravel, Clarence, New York;
Dan Gernatt, Gowanda, New York
Frey Sand & Gravel, Buffalo, New York;
Buffalo Gravel (Buffalo Slag Co.) Franklinville, N.Y.
Olean Sand & Gravel, Olean, New York;
Elmira Transit Mix, Western, New York;
Western New York Sand & Gravel & Ready Mix, Western New York;
Erie Sand & Gravel Lake Sand; Western, New York;

(c) None;

(d) Objection;

PROPERTIES:

(e) Fidinger, East of Billo Road, Lancaster, N.Y.;
Hoffman, South of Hiller Road, Newstead, N.Y.
Lancaster-Steger, Jones Rd., Clarence, N.Y.;
Duttweiler, Henry, East of Billo Rd., Newstead, N.Y
Bertha Sugg, South of Hiller Rd., Newstead, N.Y.

WASHING PLANTS: Same as above in "9E"

11. (a) Western New York;

(b) Amherst Ready-Mixed Concrete Corp;
Buffalo Gravel Corp.
Clarence Readi-Mix Concrete Corp.
Quality Concrete Inc.
County Line Ready Mix;
Stone Concrete Mix Co., Inc.;
Riley Ready Mix Concrete Corp.;
Bender Ready Mix;
Riefler Ready Mix;
George C. Frey Ready Mix Concrete Inc.;
Certified Empire North Tonawanda;
N.Y. Phenni[illegible] Ready Mix;
Schebell Ready Mi[illegible] Inc.;
Robert Buyers Rea[illegible] Mix;

(c) None

(d) Objection;

(e) Produced at own plants;

12. No;

(a) Not applicable;

(b) Not applicable;

(c) No;

13. (a) Yes; (c) No;

(b) Objection in entirety; (d) Yes -objection to balance of question;

14. Objection in entirety;

15. Objection in entirety;

ANSWER TO SECOND INTERROGATORIES:

14. The answer is "Yes" to "A, C, D, I, J, M, N, O, T. V, and W.";

Name of company in "O" should read "BISCO" not "BISCARO";

"X" as worded is impossible to answer;

15. A. Genesee Sand and Gravel Co.;
B. Acquired 12/31/52;
C. Needed equipment and sand and gravel;

A. Buffalo Sand Company, Inc. (&Sterling Sand and Gravel Co.)
B. 10/1/54;
C. Needed equipment, sand and gravel;

A. Pfohl Bros. Inc.,
B. 9/1/57;
C. Needed equipment, sand and gravel;

A. Piechocki Farm;
B. 8/12/68;
C. Needed better territorial source for material;

A. Queen City Ready Mix Concrete Co.;
B. 1-/7/63;
C. Needed some of the equipment and the plant as a reserve;

McDONOUGH, BOASBERG, McDONOUGH & BELTZ

A. Blasdell Ready Mix;
B. 11/7/56;
C. Needed plant in that location;

A. Paolini Ready Mix Concrete;
B. 12/28/55;
C. In settlement of account;

A. Bisco Ready Mix Co.;
B. 7/15/50;
C. Needed plant in that location;

A. Buffalo Perlite Corp.
B. 3/31/70;
C. For diversification;

A. Aero Aggregate;
B. 3/31/70;
C. Merger (inactive sales agency);

A. Various lands acquired and known by their former owners, names with dates acquired as follows:

A. NAME OF PROPERTY:	B. DATE ACQUIRED:
Christner	3/31/58
Cornwell	9/28/66
Czapla	8/14/63
Dawson	10/20/65
Eugene Duttweiler	12/4/59
Fred Duttweiler	12/31/68
Henry Duttweiler	8/11/59
Fidinger-Parcel #2	7/30/58
Inland Enterprises	11/28/55
Luchterhand	4/1/60
Pawlikowski	11/28/55
Remsen	8/14/63
Revelle	9/14/55
Bertha Sugg	10/24/68
Wagner	1960
Williams	1959
Wolf	1/2/67
Zimmerman	8/28/59

C. Purpose as it applies to the above- needed sand and gra reserves.

15. "D, E, F,"and"G" for all of the above - objection;

16.A.Objection;
B.All companies shown in "9B", plus:
.Lancaster Stone Products, Inc., Erie County
Buffalo Crush Stone Company, Erie County
Federal Crush Stone Company, Erie County
Buffalo Slag Company, Erie County;
Niagara Stone, Niagara County;
County Line Stone Company, Inc., Erie County
Frontier Stone Products, Inc., Niagara County;

McDONOUGH, BOASBERG, McDONOUGH & BELTZ

C. Objection;

D. Objection;

17. Objection in entirety;

18. Objection in entirety;

19. Objection in entirety;

20. Objection in entirety;

21. Objection in entirety;

22. Objection in entirety;

23. Objection in entirety;

24. Objection in entirety;

25. Objection in entirety;

26. Objection in entirety;

DATED: BUFFALO, NEW YORK
July 7 1971

PINE HILL CONCRETE MIX CORP.,

BY: Ludwig F. Kahle
PRESIDENT

STATE OF NEW YORK)
ss:
COUNTY OF ERIE)

LUDWIG F. KAHLE, being duly sworn, deposes and says:

That he is the President of PINE HILL CONCRETE MIX CORP., th corporation named in the within entitled action; that he has re the foregoing Answers to Interrogatories and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Ludwig F. Kahle
LUDWIG F. KAHLE

Subscribed and Sworn to before me this 7 day of July 1971

Norman M. Moran

NORMAN M. MORAN
Notary Public in the State of New York
Qualified in Erie County
My Commission expires Mar. 30, 1973

Answer of Defendant Regent Sand & Gravel Corp. to Plaintiffs' Interrogatories.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC.; and HERBERT FREY AND LOIS MUCK as Co-Executors of the ESTATE OF GEORGE C. FREY, Deceased

Plaintiffs

vs

REGENT SAND & GRAVEL CORP., PINE HILL CONCRETE MIX CORP.; LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL, and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, liquidators and receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation; and PFOHL BROTHERS, INC.,

Defendants

CIVIL ACTION
No. 1970-277

DEFENDANT REGENT SAND & GRAVEL CORP. IN ANSWER TO PLAINTIFF'S INTERROGATORIES

Defendant REGENT SAND & GRAVEL CORP., answers the first and second interrogatories served upon it by the plaintiffs, upon information and belief, as follows:

ANSWER TO FIRST INTERROGATORIES:

1 (a) Regent Sand & Gravel Corp., principal place of business is 2255 Bailey Avenue, Buffalo, New York; LUDWIG F. KAHLE, President CARL E. KAHLE, Vice President; CURT G. KAHLE, Treasurer; and ROBERT JONES, Secretary;

(b) July 18, 1957;

(c) Objection;

(d) Lease land and equipment;

(e) Pine Hill Concrete Mix Corp.; sole stockhler; There are no others having an equity or interest in REGENT SAND & GRAVEL CORP., other than creditors in the ordinary course of corporation business;

2. Objection in entirety;

3. Objection in entirety;

McDONOUGH, BOASBERG, McDONOUGH & BELTZ

4. No.

(a) Not applicable;

(b) Not applicable;

(c) Not applicable;

(d) No;

(e) Not applicable;

5. Objection in entirety;

6. No;

7. No;

8. No;

9. (a) Western New York;

(b) Clarence Sand & Gravel, Clarence, New York;
Dan Gernatt, Gowanda, New York;
Frey Sand & Gravel, Buffalo, New York;
Buffalo Gravel Co. (Buffalo Slag Co.) Franklinville, New York;
Olean Sand & Gravel, Olean, New York;
Elmira Transit Mix, Western, New York;
Western New York Sand & Gravel & Ready Mix, Western New York;
Erie Sand & Gravel Lake Sand, Western New York;

(c) None;

(d) Objection

(e) SOURCE OF SUPPLY:

Peppermint Road, 31 Peppermint Road, Lancaster, New York;
Lancaster-Steger, Jones Road, Clarence, New York;
Hoffman, South of Hiller Road, Newstead, New York;
Stage Farms (Fahey), Genesee Street, Lancaster, New York;
Ray Duttweiler, East of Billo Road, Alden, New York;

WASHING PLANT:

Peppermint & Pavement Road, Lancaster, New York;

10. (a) Western New York;

(b) Clarence Sand & Gravel, Clarence, New York;
Dan Gernatt, Gowanda, New York;
Frey Sand & Gravel, Buffalo, New York;
Buffalo Gravel Co. (Buffalo Slag Co.) Franklinville, New York;
Olean Sand & Gravel, Olean, New York;
Elmira Transit Mix, Western, New York;
Western New York Sand & Gravel & Ready Mix, Western, N.Y.
Erie Sand & Gravel Lake Sand, Western, New York;

McDONOUGH, BOASBERG, McDONOUGH & BELTZ

(c) None;

(d) Objection;

(e) Not applicable;

11. "A" through "E" not applicable ;

12. No;

13. Not applicable

14. Not applicable;

15. Not applicable;

ANSWERS TO SECOND INTERROGATORIES:

14. Yes

15. A) Pfohl Bros. Inc.
B) 7/1/57
C) Needed equipment, sand and gravel

A) Queen City Ready Mix Concrete Co.
B) Acquired nominal number of shares about 1958;
C) Incidental to purchase of Pfohl Bros. Inc.

A) Quadico Trucking
B) Acquired nominal number of shares in about 1958;
C) incident to purchase of Pfohl Bros. Inc.

A) Aero Aggregate
B) 3/31/70
C) Merger;

"W" A) Simmons Property
B) 11/64
C) needed reserve supply;

A) Volz Property;
B) 7/63
C) needed reserve supply

A) Frey interest in Duttwiler and Schuster properties;
B) 7/57
C) needed reserves

A) Stage Farms
B) 3/31/70
C) Merger

A) Jamieson Bank Run Gravel Corp.
B) Acquired nominal number of shares - about 1958;
C) incidental to purchase of Pfohl Bros. Inc.

Answer of Defendant Regent Sand & Gravel Corp. to Plaintiffs' Interrogatories.

16. a) Objection
b) Lancaster Stone Products, Inc., Erie County;
Buffalo Crush Stone Company, Erie County;
Federal Crush Stone Company, Erie County;
Buffalo Slag Company, Erie County;
Niagara Stone, Niagara County;
County Line Stone Company, Inc., Erie County;
Frontier Stone Products, Inc., Niagara County;
plus all companies in "9B".
c) Objection;
d) Objection;

17. Objection in entirety;

18. Objection in entirety;

19. Objection in entirety;

20. Objection in entirety;

21. Objection in entirety;

22. Objection in entirety;

23. Objection in entirety;

24. Objection in entirety;

25. Objection in entirety;

26. Objection in entirety;

DATED: BUFFALO, NEW YORK
July 7 1971

REGENT SAND & GRAVEL CORP.

By: Ludwig F. Kahle

LUDWIG F. KAHLE

STATE OF NEW YORK)
ss:
COUNTY OF ERIE)

LUDWIG F. KAHLE, being duly sworn, deposes and says that he is the President of Regent Sand & Gravel Corp., the corporation named in the within entitled action; that he has read the foregoing Answers to the interrogatories and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as t hose matters he believes it to be true.

Ludwig F. Kahle

LUDWIG F. KAHLE

Subscribed and Sworn
to before me this 7 day of July 1971

Norman M. Moran

NORMAN M. MORAN
Notary Public in the State of New York
Qualified in Erie County
My Commission expires Mar 30 1973

McDONOUGH, BOASBERG, McDONOUGH & BELTZ

Answer of Defendant Ludwig F. Kahle
to Plaintiffs' Interrogatories.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC.; and HERBERT FREY AND LOIS MUCK as Co-Executors of the ESTATE OF GEORGE C. FREY, Deceased
Plaintiffs

vs

LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL, and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, liquidators and receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation; and PFOHL BROTHERS, INC.,
Defendants

CIVIL ACTION.
No. 1970-277

DEFENDANT LUDWIG F. KAHLE IN ANSWER TO PLAINTIFFS' INTERROGATORIES:

Defendant LUDWIG F. KAHLE, answers the first and second interrogatories served upon him by the plaintiffs, upon information and belief, as follows:

ANSWER TO FIRST INTERROGATORIES:

1. (a) Ludwig F. Kahle, 96 Huntley Road, Buffalo, New York; Business Address, 2255 Bailey Avenue, Buffalo, New York;

(b) Not applicable;

(c) Not applicable;

(d) 1. Manufacturing Ready Mix Concrete; Pine Hill Concrete Mix Corp.; 2255 Bailey Avenue, Buffalo, New York;

2. Mark Stables Harness Horse Racing, 96 Huntley Rd., Buffalo, New York;

3. Pine Hill Breeding Stables, breeding of harness horses; 96 Huntley Road, Buffalo, New York;

4. Jamieson Bank Run Gravel Corp., 2255 Bailey Avenue, Buffalo, New York, part owner; mining sand and gravel;

5. Lancaster Sanitary Landfill, Inc., 2255 Bailey Avenue, Buffalo, New York; sanitary land fill business;

(e) Regent Sand & Gravel Corp;
Pine Hill Concrete Mix Corp.;
Clarence Sand and Gravel Corp;

McDONOUGH, BOASBERG, McDONOUGH & BELTZ

(2) Objection in entirety;

(3) Objection in entirety;

(4) No;

(5) Objection in entirety;

(6) No;

(7) No;

(8) No;

(9) No business conducted as individual;

(10) No business conducted as individual;

(11) No business conducted as individual;

(12) Not applicable;

(13) Not applicable;

(14) Not applicable;

(15) Not applicable;

ANSWERS TO SECOND INTERROGATORIES:

(14) No to companies "A" to "V," however did own stock in Buffalo Perlite at one time;

"W" - No - exceptowned stock in two companies;

"X" as worded impossible to answer;

(15) A) Buffalo Perlite
B) 1957 through 1969
C) Diversification;

A) Jamieson Bank Run Gravel Corp.
B) 12/12/56
C) Needed sand and gravel reserves;

A) AREO Aggregate
B) 1956 through 1957
C) needed sales agency;

D, E, F and G - for above- objection

(16) A) Objection;
B) Clarence Sand & Gravel, Clarence, N.Y.;
Dan Gernatt, Gowanda, New York;
Frey Sand & Gravel, Buffalo, New York;
Buffalo Gravel (Buffalo Slag Co.), Franklinville, New York;
Olean Sand & Gravel, Olean, New York;

Elmira Transit Mix, Western New York;
Erie Sand & Gravel Lake Sand; Western New York;
Western New York Sand & Gravel & Ready Mix, Western New York;
Lancaster Stone Products, Inc., Erie County;
Buffalo CrushStone Company, Erie County;
Federal Crush Stone Company, Erie County;
Buffalo Slag Company, Erie County;
Niagara Stone, Niagara County;
County Line Stone Company, Inc., Erie County;
Frontier Stone Products, Inc., Niagara County;

c) Objection;
d) Objection;

(17) Objection in entirety;

(18) Objection in entirety;

(19) Objection in entirety;

(20) Objection in entirety;

(21) Objection in entirety;

(22) Objection in entirety;

(23) Objection in entirety;

(24) Objection in entirety;

(25) Objection in entirety;

(26) Objection in entirety;

DATED: BUFFALO, NEW YORK,
July 7 1971

LUDWIG F. KAHLE

STATE OF NEW YORK)
ss:
COUNTY OF ERIE)

LUDWIG F. KAHLE, being duly sworn deposes and says:

That he is one of the defendants in this action; that he has read the foregoing Answers to Interrogatories and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Subscribed and Sworn
to before me this 7 day of July 1971

Norman M. Moran

NORMAN M. MORAN
Notary Public in the State of New York
Qualified in Erie County
My Commission expires Mar. 30, 1973

McDONOUGH, SCASSERO, McDONOUGH & SELTZ

Answer of Defendant Joseph Pfohl
to Plaintiffs' Interrogatories.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC.; AND HERBERT FREY and LOIS MUCK as Co-Executors of the ESTATE OF GEORGE C. FREY, Deceased

Plaintiffs

vs

PINE HILL CONCRETE MIX CORP.; REGENT SAND & GRAVEL CORP.; LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL, and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, liquidators and receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation; and PFOHL BROTHERS, INC.,

Defendants

CIVIL ACTION.
No. 1970-277

DEFENDANT JOSEPH PFOHL, IN ANSWER TO PLAINTIFFS' INTERROGATORIES:

Defendant JOSEPH PFOHL, answers the first and second interrogatories served upon him by the plaintiffs, upon information and belief, as follows:

ANSWER TO FIRST INTERROGATORIES:

(1) (a) JOSEPH PFOHL
503 North Forest Road, Williamsville, New York;
Business:
5833 Main Street, Buffalo, New York, 14221

(b) Not applicable;

(c) Not applicable;

(d) Lancaster Stone Products Corp.
5833 Main Street, Buffalo, New York; 14221
Product crushed stone and bituminous concrete plant;
Barton Road, Lancaster, New York;

Bryherst Inc., 5833 Main Street, Buffalo, New York;
Real Estate Investment;

Pfohl Bros. 5833 Main Street, Buffalo, N.Y.; rental
Pfohl Enterprises, 5833 Main St. Buffalo, N.Y. real estate;

(e) Lancaster Stone Products Corp.
stockholders, Joseph Pfohl, Paul M. Pfohl and Fidelis H. Pfohl;
Pfohl Enterpises;
Joseph Pfohl, Paul M. Pfohl and Fidelis H. Pfohl and Richard Pfohl;

McDONOUGH, BOASBERG, McDONOUGH & BELTZ

Pfohl Bros;
Partners, Paul M. Pfohl, Joseph Pfohl, Fidelis H. Pfohl,

Bryherst Inc.,
Joseph Pfohl, Fidelis H. Pfohl, Richard Pfohl, Margaret Bogner, Richard Curtis, Albertine M. Kline;

(2) Objection in entirety;

(3) Objection in entirety;

(4) No;

(5) Objection in entirety;

(6) No;

(7) Yes;

(8) No - except did sell stock in Pfohl Bros, Inc., to Pine Hill Concrete Mix Corp.

(9) Not applicable - not in gravel business;

(10) Not applicable - not in gravel business;

(11) Not applicable - not in gravel business;

(12) Not applicable;

(13) Not applicable;

(14) Not applicable;

(15) Not applicable;

ANSWERS TO SECOND INTERROGATORIES:

(14) Yes;

(15) A) Pfohl Bros. Inc.
B) & C) Major stockholders sold to Pine Hill Concrete Mix Corp.;

A) Lancaster Stone Products Corp.;
B) Incorporated 11/27/57;
C) produce stone and bituminous concrete;

A) Buffalo Perlite;
B) 6/1/53 acquired 3 1/3 shares;
6/13/56, acquired 3 1/3 shares;
C) Diversified;

A) Quadco Trucing;
B) Prior 1958 - Pfohl Bros. Inc.
owned 25 shares;
C) Trucking facilities;

A) Queen City Ready Mix Concrete Co.;
B) Prior 1958 - Pfohl Bros. Inc. owned 25 shares;
C) as investment;

V. A) West Seneca Bituminous Products Inc.
B) Acquired 1961 sold 1963;
C) Investment;

W. A) Stage Farms Inc.
B) 1950;
C) Gravel supply

A) Capella Farm Inc.
B) 1958 - had interest
C) Prospecting;

A) Niagara Stone
B) Had option 1966 - never materialized;
C) N/A;

A) Lancaster Sand & Gravel Co.
B) Prior 1958 - Pfohl Bros Inc. owned 30 shares;
C) source of supply;

15. "D, E, F and G" for above - objection;
16. A) Objection;
B) B. R. DeWitt Inc., Pavillion, New York;
Buffalo Slag, Buffalo, N.Y.;
Lancaster Stone Products, Inc., Erie County
Buffalo Crush Stone Company, Erie County;
Federal CrushStone Company, Erie County;
Buffalo Slag Company, Erie County;
Niagara Stone, Niagara County;
County Line Stone Company, Inc., Erie County;
Frontier Stone Products, Inc., Niagara County;
C) Objection;
D) Objection;

17. Objection in entirety;

18. Objection in entirety;

19. Objection in entirety;

20. Objection in entirety;

21. Objection in entirety;

22. Objection in entirety;

23. Objection in entirety;

Answer of Defendant Joseph Pfohl
to Plaintiffs' Interrogatories.

24. Objection in entirety;

25. Objection in entirety;

26. Objection in entirety;

DATED: BUFFALO, NEW YORK
JULY 8th 1971

JOSEPH PFOHL

STATE OF NEW YORK)
COUNTY OF ERIE) ss:

JOSEPH PFOHL, being duly sworn, deposes and says:

That he is one of the defendants in this action; that he has read the foregoing Answers to Interogatories and knows the contents thereof; that thesame is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JOSEPH PFOHL

Subscribed and Sworn to before
me this 8th day of July 1971

ALBERTINE M. KLINE
Notary Public State of New York
Qualified in Erie County
My Commission Expires March 30, 1973

Answer of Defendant Fidelis H. Pfohl
to Plaintiffs' Interrogatories.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY - MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC.; and HERBERT FREY and LOIS MUCK as co-executors of the ESTATE OF GEORGE C. FREY, deceased, Plaintiffs	CIVIL ACTION. NO. 1970-277
vs PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP.; LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL, and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, liquidators and receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation; and PFOHL BROTHERS, INC., Defendants	DEFENDANT FIDELIS H. PFOHL, IN ANSWER TO PLAINTIFFS' INTERROGATORIES:

Defendant FIDELIS H. PFOHL, answers the first and second interrogatories served upon him by the plaintiffs, upon information and belief, as follows:

ANSWERS TO FIRST INTERROGATORIES:

(1) (a) Fidelis H. Pfohl residing at
51 East Four Seasons Drive
Eggertsville, New York;

Business Address:
5833 Main Street
Buffalo, New York, 14221

(b) Not applicable;

(c) Not applicable;

(d) Lancaster Stone Products Corp.
5833 Main Street, Buffalo, New York, 14221
product crushed stone and bituminous concrete plant;
Barton Road, Lancaster, New York;

Bryherst Inc., 5833 Main Street, Buffalo, New York;
real estate investment;

Pfohl Bros. 5833 Main Street, Buffalo, New York;
equipment rental;

Pfohl Enterprises, 5833 Main Street, Buffalo, New York;
real estate;

(e) Lancaster Stone Products Corp.
stockholders, Joseph Pfohl, Paul M. Pfohl and
Fidelis H. Pfohl;

Pfohl Bros.,
Partners: Paul M. Pfohl, Joseph Pfohl and
Fidelis H. Pfohl;

Bryherst, Inc.,
Joseph Pfohl, Fidelis H. Pfohl, Richard Pfohl,
Margaret Bogner, Richard Curtis, Albertine M. Kline;

Pfohl Enterprises:
Joseph Pfohl, Paul M. Pfohl, Fidelis H. Pfohl and
Richard Pfohl;

(2) Objection in entirety;

(3) Objection in entirety;

(4) No;

(5) Objection in entirety;

(6) No;

(7) Yes;

(8) No - except did sell stock in Pfohl Bros. Inc.
to Pine Hill Concrete Mix Corp.

(9) Not applicable - not in gravel business;

(10) Not applicable - not in gravel business;

(11) Not applicable - not in gravel business;

(12) Not applicable;

(13) Not applicable;

(14) Not applicable;

(15) Not applicable;

ANSWERS TO SECOND INTERROGATORIES:

(14) Yes;

(15) A) Pfohl Bros. Inc.
B & C) Major stockholders sold to Pine Hill Concrete
Mix Corp.;

A) Lancaster Stone Products Corp.;
B) Incorporated 11/27/57
C) produce stone and bituminous concrete;

Answer of Defendant Fidelis H. Pfohl to Plaintiffs' Interrogatories.

A) Buffalo Perlite;
B) 6/1/53 Acquired 8 1/3 shares;
6/13/56, acquired 8 1/3 shares;
C) Diversified;

A) Quadco Trucking;
B) Prior 1958 - Pfohl Bros. Inc.
owned 25 shares;
C) Trucking facilities;

A) Queen City Ready Mix Concrete Co.;
B) Prior 1958 - Pfohl Bros. Inc. owned 25 shares;
C) as investment;

V. A) West Seneca Bituminous Products Inc.
B) Acquired 1961 sold 1963;
C) Investment;

W. A) State Farms Inc.
B) 1950;
C) Gravel supply

A) Capella Farm Inc.
B) 1958 - had interest
C) Prospecting;

A) Niagara Stone
B) Had option 1966 - never materialized;
C) N/A;

A) Lancaster Sand & Gravel Co.
B) Prior 1958 - Pfohl Bros Inc. owned 30 shares;
C) source of supply;

15. "D, E, F and G" for above-objection;
16. A) Objection;
B) B. R. DeWitt Inc., Pavillion, New York;
Buffalo Slag, Buffalo, N.Y.;
Lancaster Stone Products, Inc., Erie County
Buffalo Crush Stone Company, Erie County;
Federal Crush Stone Company, Erie County;
Buffalo Slag Company, Erie County;
Niagara Stone, Niagara County;
County Line Stone Company, Inc., Erie County;
Frontier Stone Products, Inc., Niagara County;
C) Objection;
D) Objection;

"17 through and including 26" Objection in entirety;

DATED: BUFFALO, NEW YORK
JULY 8th 1971

Fidelis H. Pfohl
FIDELIS H. PFOHL

McDONOUGH, BOABBERG, McDONOUGH & BELTZ

Answer of Defendant Fidelis H. Pfohl
to Plaintiffs' Interrogatories.

STATE OF NEW YORK)
ss:
COUNTY OF ERIE)

FIDELIS H. PFOHL, being duly sworn, deposes and says:

That he is one of the defendants in this action; that he has read the foregoing Answers to Interrogatories and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he belives it to be true.

Fidelis H. Pfohl
FIDELIS H. PFOHL

Subscribed and Sworn to before
me this 8th day of July 1971

Albertine M. Kline
ALBERTINE M. KLINE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1972

McDONOUGH, BOASBERG,
McDONOUGH & BELTZ

Answering Affidavit of Charles J. McDonough.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC. and
HERBERT FREY and LOIS MUCK as co-executors
of the Estate of GEORGE C. FREY, deceased

Plaintiffs

-vs-

1970-277

PINE HILL CONCRETE CORP., REGENT SAND & GRAVEL
CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M.
PFOHL, and FIDELIS M. PFOHL, individually and as
the controlling and surviving directors, officers,
shareholders, liquidators and receivers of the
assets of PFOHL BROTHERS, INC., a dissolved
corporation and PFOHL BROTHERS, INC.

Defendants

STATE OF NEW YORK)
COUNTY OF ERIE) ss
CITY OF BUFFALO)

CHARLES J. McDONOUGH, being duly sworn, deposes and says that he is of counsel for the defendants herein. This affidavit is submitted in opposition to the plaintiffs' motion for a separate trial of certain issues.

Deponent has read the affidavit of HERBERT G. FREY submitted in support of the motion. For the purposes of the present motion, deponent deems it unnecessary to reply to or explain many of the allegations of fact therein contained, as they are not material to the question of whether or not a separate trial of preliminary issues should be ordered herein.

Deponent does, however, respectfully refer the court to deponent's two earlier affidavits, as well as the affidavit of NORMAN MORAN of the defendant PINE HILL CONCRETE MIX CORP., previously submitted in opposition to the plaintiffs' earlier motion for interim relief; and begs leave to incorporate in this affidavit all the allegations of fact therein contained.

With respect to Mr. Frey's statements concerning previous price increases by Pine Hill, between 1949 and 1968 (pp. 3-7), deponent calls the court's attention to the following:

1) The price increase in August 1953 (Paragraphs 8, 9) was based on Pfohl's list price.

2) The 1954 price increase (Paragraph 10-a) was based on Pfohl's published pit price

3) No supporting letters or other documents are presented in support of the allegations of Paragraph 10 (b and c) of Mr. Frey's affidavit.

4) The 1958 price increase (Paragraph 16) was to Pine Hill's published pit price

5) The 1968 price increase, which Frey refused to pay (Paragraph 17) was also based on Pine Hill's published pit price.

Mr. Frey's affidavit (Paragraph 12) as well as the plaintiffs' complaint (Paragraph 25) allege that the 1957 deeds of gravel properties from PFOHL BROS. to REGENT SAND & GRAVEL CORP.

were either forged, fraudulently predated or both, because of the fact that they were not recorded until 1969.

All of the deeds in question were drawn by Mr. Milton Kaeselau, a well known Buffalo attorney, who represented Pine Hill at that time. Mr. Kaeselau has assured deponent that he will testify to the preparation, execution and delivery of all such deeds in 1957.

With respect to the latter portion of Mr. Frey's affidavit, (p. 10), under the heading "Second Separate Trial" deponent submits that this court's order of June 9, 1971, made and entered two days after Mr. Frey's affidavit was signed, is a complete answer to these allegations, and furnishes the plaintiffs with all the interim protection for which they have asked. In fact, if the plaintiffs are eventually successful in their state claims of contract violation, they will be entitled to no further or greater relief, other than past damages, than the relief granted by the court's order of June 9.

Following entry of the court's order of June 9, and on June 25, 1971, the plaintiffs made the demand for delivery of grit and gravel contained in the annexed letter, marked Exhibit A. On June 29, the defendant Pine Hill acceded to said demand, in the letter annexed hereto, and marked Exhibit B. As of the date of this affidavit, the ready-mix concrete truck drivers'

strike is still going on.

On July 9, 1971, counsel for the defendants served and filed the defendants' answers to the plaintiffs' first and second interrogatories herein, with the exception of the answers of the defendant PAUL M. PFOHL, who lives in Oregon. The separate answers of the defendant PAUL M. PFOHL will be served in the near future.

CHARLES J. McDONOUGH

Sworn to before me this 15th
day of July 1971

ROBERT BOASBERG

ROBERT BOASBERG
Notary Public State of New York
Qualified in [illegible] County

Try Our Service

GEORGE C. FREY
Ready Mixed Concrete, Inc.
561 PAVEMENT ROAD -:- LANCASTER, N. Y. 14086

June 25, 1971

Pine Hill Concrete Mix Corp.
[illegible] Bailey Ave.
Buffalo, N. Y. 14211

Gentlemen:

Persuant to Court Order of June 9, 1971, please start delivery of our requirements of Concrete Grit and Concrete Gravel to our Peppermint Rd. Plant on Monday June 28, 1971, or immediately upon the conclusion of truck drivers strike.

Yours very truly,

Lois Mack

Sec. & Pres.

Copy to:
Regent Sand & Gravel Corp.
Pfohl Bros., Inc.

EXHIBIT "A"

We Comply With State and Federal Labor Laws

PINE HILL CONCRETE
MIX CORP.

George D. Frey Ready Mixed Concrete Inc.
501 Pavement Road
Lancaster, New York 14086

Gentlemen:

Please be advised that we will start delivery of concrete grit and gravel pursuant to the Court Order of June 4, 1971 immediately upon the conclusion of the current truck drivers' strike.

Sincerely Your ,

Pine Hill Concrete Mix Corp.

Norman M. Haras
Controller

EXHIBIT "B"

Controlled Quality

62A Note Of Issue

Plaintiffs' Note of Issue—March 1972 Term.

ABRO Graphic Corp., Publishers
6 Davidson Ave., Buffalo, N.Y. 14215

NOTE OF ISSUE

(Type or Print)

This space for Clerk's file stamp

Calendar No. .....

Index No. Civil # 1970-277

UNITED STATES ~~DISTRICT~~ DISTRICT COURT ~~COUNTY~~

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIX CONCRETE, INC., et al., Plaintiffs,

vs.

PINE HILL CONCRETE MIX CORP., et al., Defendants.

NOTICE FOR TRIAL ... March 14 ..., 1972

Trial by jury of 12 jurors demanded ☐

☒ Of all issues

☐ Of issues specified below or attached hereto

Trial without jury ☐

Filed by Attorney for Plaintiffs

Date ~~Amended~~ Complaint filed 6/17/70

Date Service Completed .....

Date issue joined .....

Preference claimed under .....

on the ground that .....

.....

NATURE AND OBJECT OF ACTION (Specify for each cause of Action)

Negligence

	M.V.	R.R.	Bldg. & Sidewalk	Other
Personal Injury	☐	☐	☐	☐
Property Damage	☐	☐	☐	☐
Both	☐	☐	☐	☐

Other Tort (specify) .....

Contract (specify) Breach of contract, Rescision, Breach of Condition

Other Law (specify) .....

Matrimonial (specify) .....

Other Equity (specify) .....

Amount Demanded $ 250,000 plus interest (trebling thereof under First Claim) plus reconveyance of title

Other Relief .....

RAICHLE, BANNING, WEISS & HALPERN
Attorney(s) for Plaintiff(s)
Office & P.O. Address:
10 Lafayette Square, Buffalo, N.Y.14203
Phone No.:
716 852 7587

McDONOUGH, BOARDMAN, McDONOUGH & KANE
Attorney(s) for Defendant(s)
Office & P.O. Address:
930 Walbridge Building, Buffalo, NY 1420
Phone No.:
716 852 5282

BY Arnold Weiss
Arnold Weiss, a Member of the Firm

Note: Clerk will not accept this note of issue unless prepared in duplicate and reverse side is completed or the stipulation provided in 22 N.Y.C.R.R. §1024.4(c) is annexed.

30

Plaintiffs' Note of Issue—March 1972 Term.

Affidavit of Service

State of New York, County of ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at
That on the day of ,19
deponent served the within note of issue and statement of readiness on

attorney (s) for
herein, at his office at

during his absence from said office
strike out either (a) or (b)
(a) by then and there leaving a true copy of the same with
his clerk; partner; person having charge of said office.
(b) and said office being closed, by depositing the same, enclosed in a sealed wrapper directed to said attorney(s) in the office letter drop or box.

Sworn to before me, this
day of ,19

State of New York, County of **Erie** ss.:

F. Terry Szymczyk
being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at **555 Kings Highway, Snyder, N.Y.**

That on the **23rd** day of **February** ,19 **72**
deponent served the within note of issue and statement of readiness on **McDONOUGH, BOASBERG, McDONOUGH & BELTZ**
attorney(s) for **defendants**
at **930 Walbridge Bldg., Buffalo, NY14202**
the address designated by said attorney(s) for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in ~~XXXXXXXX~~ official depository under the exclusive care and custody of the United States post office department within New York State.
at 10 Lafayette Square, Buffalo, NY14203.

Sworn to before me, this **23rd**
day of **February** ,19 **72**

Sworn to before me
this 23rd day of February, 1972.
Helen B. Gerber
HELEN B. ~~GERBER~~ **Gerber**
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1973

Admission of Service

Due service of a note of issue, and statement of readiness of which the within is a copy, admitted this
day of ,19

Attorney(s) for

Statement of Readiness

For use in the Fourth Judicial Department
Required under 22 N. Y. C. R. R. S 1024.4

Items 1 - 6 must be Checked	Complete	Waived	Not Required
1. All pleadings served			
2. Bill of particulars served			
3. Physical Examinations had			
4. Medical Reports Exchanged			
5. Examinations before trial completed			
6. All depositions now known to be necessary completed			

7. There has been a reasonable opportunity to complete the above proceedings

8. The case is ready for trial

Dated:

(Signature)
Attorney(s) for
Office and P.O. Address:

Stipulation of Readiness

Stipulated that the above enumerated proceedings have been completed or waived.

Dated:

Attorney(s) for Plaintiff

Attorney(s) for Defendant

Attorney(s) for all parties must sign.

Plaintiffs' Notice of Depositions.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC.; and HERBERT FREY and LOIS MUCK as Co-Executors of the ESTATE OF GEORGE C. FREY, Deceased,
Plaintiffs,

Civil Action
No. 1970-277

vs.

NOTICE
OF
TAKING DEPOSITIONS

PINE HILL CONCRETE MIX CORP.; REGENT SAND & GRAVEL CORP.; LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL, and FIDELIS H. PFOHL, individually and as the controlling and surviving directors, officers, shareholders, liquidators and receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation; and PFOHL BROTHERS, INC.,
Defendants.

PLEASE TAKE NOTICE that plaintiffs will take the depositions of the defendants individually and by their respective officers, directors, employees and agents having knowledge of the facts, commencing with the deposition of the defendant Ludwig Kahle, followed by the deposition of Norman Moran, followed by the remaining witnesses, commencing at 10:00 A.M. on Monday, February 19, 1973 at Room 1400, 10 Lafayette Square, Buffalo, New York. You are invited to attend and cross-examine.

Dated: Buffalo, New York
February 13, 1973.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

Plaintiffs' Motion to Compel Discovery.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs.

Civil No. 1970-277

vs.

MOTION

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

Plaintiffs move the Court for an order granting them leave to proceed with their discovery herein and deferring further discovery by defendants until the completion of plaintiffs' discovery.

Dated: Buffalo, New York

May 18, 1973.

RAICHLE, BANNING, WEISS & HALPERN

By _____

Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

Answering Affidavit of Victor E. Manz.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., etc., et al

Plaintiffs

vs

CIVIL No. 1970-277

PINE HILL CONCRETE MIX CORP.
REGENT SAND & GRAVEL CORP.
LUDWIG F. WEISS, etc., et al

ANSWERING AFFIDAVIT

Defendants

STATE OF NEW YORK)
ss:
COUNTY OF ERIE)

VICTOR E.MANZ, being duly sworn, deposes and says:

1. That I am handling the taking of depositions and the discovery proceedings against plaintiffs in this matter for CHARLES J. McDONOUGH, attorney for defendants;

2. That both Mr. Weiss and I have delayed and mutually agreed to adjournments of the proceeding from time to time;

3. That the tentative schedule set up before Magistrate EDMUND F. MAXWELL was deviated from by mutual consent of the attorneys herein;

4. That 415 pages of testimony have been taken and transcribed and some business records have been furnished by plaintiffs to the defendants;

5. That during the later days of taking testimony, a dispute arose as to plaintiffs furnishing defendants with certain information and documents and the proceeding ground to a stand-still;

6. That basically the dispute arose out of Mr. Weiss's insistence that defendants must agree to reciprocate by furnishing the exact records and information defendants are demanding of plaintiffs;

Whereas it is defendants contention that certain information which is not pertinent to this law-suit should not be included in the documents furnished by either of the parties;

Specifically, business records showing defendant PINE HILL CONCRETE MIX CORP., involvement in other business matters not related to the sand and gravel, aggregate or concrete mix business

should not be shown to or examined by plaintiffs.

Plaintiffs' insistence on an agreement of reciprocity before producing certain records, such as palintiffs' audit reports and income tax returns, is unreasonable, improper and grounds for dismissal of plaintiffs' law suit;

7. To compell to produce secret and private information not relevant to this law suit is obviously improper;

8. Defendants are and have been willing at all times to furnish plaintiffs with material and pertinent records and information relevant to plaintiffs' causes of action;

9. Actually, Mr. Weiss and plaintiffs insistence on reciprocity is premature and the only valid reason to refuse to furnish defendants' with the demanded records is that it is immaterial, irrelevant and not pertinent to this law suit;

10. Attached hereto and made a part of this affidavit are photostatic copies of pages 299 to 305 inclusive of the transcribed testimony which illustrates the dispute between the parties;

11. Any delay on the part of your deponent since his return from vacation has been due to the pressure of business;

12. Deponent believes once plaintiffs are compelled to furnish the documents and information sought, defendants would be able to conclude their taking of depositions with five sessions and the inspection of business records at plaintiffs' place of business could be commenced thereafter;

13. After this time, plaintiffs could commence their discovery and this matter could be disposed of in an orderly manner;

WHEREFORE, defendants request plaintiffs be compelled to furnish their business records requested without having to agree to reciprocate as a condition precedent thereto, and that defendants be permitted to conclude their discovery before plaintiffs

commence theirs.

Victor E Manz

VICTOR E. MANZ

Subscribed and Sworn to before

me this 22nd day of May 1973

Anita Sanucci

ANITA SANUCCI, NOTARY PUBLIC, ERIE COUNTY,
NEW YORK, MY COMMISSIONEXPIRES MARCH 30,
1974

HERBERT FREY, having previously been duly sworn, was examined and testified further as follows:

EXAMINATION BY MR. MANZ:

Q. Okay. Let's see, this is the adjourned date of the examination of Mr. Frey. Mr. Frey, you did bring a box of some of the documents that we requested previously with you this morning and you presented them to us; is that right?

A. Right.

Q. Now, this is the second box that has been presented.

MR. WEISS: Yes.

MR. MANZ: Yes. Now, we have made a list of what has not been furnished. I thought possibly we could go over this. Do you want to look at this list and see if it is correct?

MR. WEISS: This is a list made before today?

MR. MANZ: Before today, and only "J" and "K" there is partially complied with.

MR. WEISS: Item "J" was complied with today, I think?

MR. MANZ: Partially.

MR. WEISS: Partially. Well, referring to the item number here, what does that item refer to?

MR. MANZ: These are the item numbers that we had put on the record of items to be furnished.

MR. WEISS: All right. May we take that list with us, or mark it?

MR. MANZ: I thought you could look at it, look it over.

MR. WEISS: Why don't you xerox that and give us a copy?

MR. MANZ: I will, and we can determine whether or not these are the missing items.

MR. WEISS: Okay. Off the record a minute.

(DISCUSSION OFF THE RECORD).

MR. MANZ: Okay. Back on the record. Mr. Moran has just stated that if any of these requests, you know, are unreasonable and from a practical point of view, it is going to take a long time, a tedious time, to accumulate, that he is willing

to find some shortcut way to do that. In other words, we can cooperate with each other because if [illegible] to make work the other way too and when you ask for some of our records, we can expedite this if we can figure out a way. Maybe the two Office Managers could get together and figure out the easiest way of getting this information.

MR. WEISS: I think we are proceeding properly, I think, as long as we have your assurance, that all we ask for is your assurance that you will reinspect and furnish us with copies of the same materials that we want and also other things that we think are relevant.

MR. MANZ: And if there is an honest dispute, we will talk to the Judge and whatever he says, we will abide by.

MR. WEISS: Yes, but there is not dispute on anything you are asking to produce, that you will produce likewise, is that right?

MR. MANZ: Except the one point that we have already discussed.

MR. WEISS: Now, wait a second. I will repeat: anything that you have asked us to produce, you will likewise produce for us.

MR. MANZ: As it pertains to gravel, sand, grit and aggregate, cement.

MR. WEISS: That means everything you have asked us to produce.

MR. MANZ: Right.

MR. WEISS: So then I will say it again: everything you have asked us to produce, you will likewise produce the equivalent from your files?

MR. MANZ: Yes, that is right, except where the one point of dispute is, as I see it right now, that we will have to have it settled by the Judge, whether or not you are entitled to any of our records.

MR. WEISS: Relating to the garbage business?

MR. MANZ: To garbage; that is called land fill, not garbage; land fill.

MR. WEISS: I see.

MR. MANZ: And also, if in some of our audit reports and income tax reports, there are other matters that don't pertain to the lawsuit, then you are not entitled to that.

MR. WEISS: We will withhold our audit reports until such time as we receive assurance there will be reciprocation, but we will produce everything else and then I suggest that at the earliest moment we go to see Judge Curtin and get a resolution of this matter. I don't see how you can physically break down your audit reports. I would be happy to have you do it. I don't think your audit reports do contain such a breakdown.

MR. MANZ: Well, we will furnish you, and it is in the record, with all the information that you are furnishing to us. We are not asking you to furnish any other financial transactions that the Frey family is involved in, because it is not pertinent to this case, and we will

furnish you with exactly what you are furnishing us.

MR. WEISS: Well, will you furnish us with your audit reports for Pine Hill, Regent Sand & Gravel and the other defendants?

MR. MANZ: We will give you, you know, -- you are trying to be cute about it. We are not going to furnish you with any personal information about any of the financing or business operations of Pine Hill if they do not pertain to this lawsuit, even though they may be in the official audit reports. We will furnish you with the audit reports, what is required for this lawsuit and nothing more.

MR. WEISS: I will say then that we should have the Judge resolve this.

MR. MANZ: All right. When do you want to resolve it?

MR. WEISS: At your convenience.

MR. MANZ: How about tomorrow?

MR. WEISS: Tomorrow will be fine.

MR. MANZ: All right. Do you want me to set up

an appointment tomorrow in the afternoon or morning?

MR. WEISS: Let's do it right now.

MR. MANZ: Put this off right now?

MR. WEISS: No. Let's call the Judge's secretary and ask her for an appointment tomorrow morning.

MR. WEISS: All right; tomorrow morning, whatever time, but let's meet this head-on.

MR. MANZ: All right. Now, let's go over this. On the record, Mr. Weiss, I just furnished you with a photostatic copy of a resume made by Mr. Norman Moran from Pine Hill who has checked the documents left in the first box, which was left by Mr. Frey at my office on Thursday of last week and this is our list of items we contend have been requested but were not received.

Now, I have also furnished -- well, let's mark this for Identification.

(Whereupon, the document referred to

Order of May 31, 1973.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

vs. Civil 1970-277

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

APPEARANCES: Raichle, Banning, Weiss & Halpern (Arnold Weiss, of Counsel) Buffalo, New York, for Plaintiffs.

Mann, Mann & Diviak (Victor E. Mann, of Counsel), Buffalo, New York, for Defendants.

Plaintiffs' motion for an order deferring further discovery of defendants and granting leave to plaintiffs to proceed to discovery is denied.

Each side shall immediately serve the other with a subpoena duces tecum setting forth the material needed to proceed with the taking of depositions.

During the week of June 4, 1973, defendants shall resume deposing plaintiffs' representatives at such time as is agreeable to the parties. If a satisfactory time cannot be agreed upon, the court will set a time. Any motions to quash or modify the subpoenas shall be made promptly.

At the argument of the present motion on May 29, 1973, the plaintiffs' attorney indicated that he would move against defendants' objections to the plaintiffs' interrogatories. Such motion shall be made promptly.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: May 31, 1973

Plaintiffs' Motion to Compel Discovery.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

Civil No. 1970-277

vs.

MOTION TO COMPEL DISCOVERY

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

Plaintiffs move the Court for an order compelling discovery pursuant to Rule 37 by reason of defendants' failure to answer plaintiffs' first and second interrogatories to defendants, dated November 23, 1970 and February 24, 1971 respectively.

Plaintiffs' motion is based upon its first and second interrogatories dated November 23, 1970 and February 24, 1971 respectively; defendants' objections dated January 4, 1971 and March 30, 1971 to plaintiffs' first and second interrogatories;

plaintiffs' motion dated April 16, 1971 for an order striking defendants' pleadings and granting judgment to plaintiffs; plaintiffs' motion dated April 27, 1971 overruling defendants' objections and compelling defendants to answer plaintiffs' second interrogatories; the order of this Court dated May 7, 1971 directing defendants to answer said first and second interrogatories by June 7, 1971; plaintiffs' cross-motion dated May 13, 1971 for an order adjudging defendants in contempt of the order of this Court and the said order of May 7, 1971; the order of this Court dated June 9, 1971 modifying said order of May 7, 1971 and directing defendants to answer plaintiffs' first and second interrogatories by July 9, 1971; defendants' partial, evasive and incomplete answers and objections dated July 7 and 8, 1971 to said first and second interrogatories; plaintiffs' motion dated May 18, 1973 for leave to proceed with discovery and deferring further discovery by defendants; and the order of this Court dated May 31, 1973.

Plaintiffs further move the Court for an order directing discovery in waves by the respective parties, and deferring further discovery by defendants until plaintiffs have completed a reasonable amount of discovery of defendants.

Dated: Buffalo, New York

June 1, 1973.

RAICHLE, BANNING, WEISS & HALPERN

By _____

Arnold Weiss, a Member of the Firm

Attorneys for Plaintiffs

10 Lafayette Square

Buffalo, New York 14203

Telephone: 716 852 7587

Opposing Affidavit of Charles J. McDonough.

UNITED STATES DISTRICT COURT: WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
et al

Plaintiffs

-vs-

PINE HILL CONCRETE MIX CORP. et al

Civil No.
1970-277

Defendants

STATE OF NEW YORK)
COUNTY OF ERIE) ss
CITY OF BUFFALO)

CHARLES J. McDONOUGH, being duly sworn, deposes and says that he is of counsel for the defendants. This affidavit is submitted in opposition to the plaintiffs' motion for various frms of relief, dated June 1, 1973.

The defendants' answers to the plaintiffs' interrogatories were served on July 9, 1971. The plaintiffs have waited two years to complain of the insufficiency of the defendants' answers to the interrogatories. We submit that this is unreasonable delay and laches on the part of the plaintiffs and constitutes a waiver of any right the plaintiffs might otherwise have to seek relief based on the alleged insufficiency of our answers.

Deponent further submits that the plaintiffs' motion in this respect is further defective in that the plaintiffs have completely failed to point out any particular answers which the plaintiffs now claim to be "partial, evasive and incomplete."

Opposing Affidavit of Charles J. McDonough.

As evidenced by the accompanying affidavit of VICTOR E. MANZ, also of counsel to the defendants, the defendants have for some time past been ready to proceed with the discovery proceedings and examination before trial of the plaintiffs. The defendants' discovery and examination should be completed before the plaintiffs proceed with their discovery and examination before trial of the defendants, as directed by this court's order of June 9, 1972.

For the court now, at this late date, to direct discovery "in waves" as requested by the plaintiffs' motion, could lead only to further controversy and utter confusion. Such procedure would not expedite trial of the action. It could only delay it.

Deponent therefore respectfully prays that the plaintiffs' motion be denied in all respects.

CHARLES J. McDONOUGH

Sworn to before me this 27th
day of June 1973

RICHARD F. McDONOUGH

RICHARD F. McDONOUGH
Notary Public State of New York
Qualified in Erie County
My Commission expires Mar. 30, 1974

Affidavit of Victor E. Manz.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC. et al
Plaintiffs

vs
PINE HILL CONCRETE MIX CORP., et al
Defendants

CIVIL NO. 1970-277

STATE OF NEW YORK)
ss:
COUNTY OF ERIE)

VICTOR E. MANZ, being duly sworn, deposes and says:

That he is an attorney assisting CHARLES McDONOUGH, Esq., attorney of record for defendants, in this discovery proceeding;

Since the Court's Order of May 31, 1973, your deponent and ARNOLD WEISS, attorney of record for plaintiffs, have mutually agreed as follows:

To commence taking depositions of plaintiff's representatives on July 9, 1973 at my office as this would be a convenient date for all the parties and the attorneys;

Your deponent has been ready and available to resume taking of deposition since June 13, 1973 and July 9, 1973 date was agreed to after conversation with Mr. Weiss on June 14, 1973, at which time he informed deponent that because of his commitments, his vacation from June 18 to June 24 and the unavailability of one of the principals of the plaintiffs after the 5th of June to July 8, 1973, that the depositions should be delayed. Your deponent agreed.

Deponent has served a civil subpoena duces tecum on MR. WEISS to correspond with the July 9th date. He agreed to accept service in lieu of service on plaintiffs.

Victor E. Manz
VICTOR E. MANZ

Subscribed and Sworn to
before me this 27th day of June 1973

ANITA SANUCCI, NOTARY PUBLIC, ERIE COUNTY
NEW YORK, MY COMM. EXPIRES MARCH 30, 1974

37

Plaintiffs' Subpoena to Defendants.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

Civil No. 1970-277

vs.

CIVIL SUBPOENA DUCES TECUM

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

TO: PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC., and all other persons having custody of the following books, papers and records:

YOU ARE HEREBY COMMANDED to appear in the office of VICTOR E. MANZ, attorney at law, 425 Statler Hilton, Buffalo, New York, in the City of Buffalo, New York, on the 9th day of

July, 1973, at 10:00 o'clock A.M. to testify on behalf of plaintiffs in the above-entitled action and bring with you:

1. All minute books and corporate records of defendants from January 1, 1949 to date.

2. All deeds, leases, contracts, agreements, correspondence, records and documents of every kind with the two plaintiff corporations and/or George C. Frey, deceased, with respect to the agreements dated May 17, 1949, between George C. Frey and Pfohl Brothers, Inc., as well as all subsequent amended and related agreements, from January 1, 1949 to date.

3. All annual and other financial statements, audit reports, corporate and personal income tax returns, both Federal and State, of the defendants from January 1, 1949 to date.

4. All financial statements, and profit and loss statements, both annual and otherwise and all corporate income tax returns, both Federal and State, of any and all corporations owned or controlled by any or all of the defendants dated from January 1, 1949 to date.

5. All correspondence, communications, bills, invoices, contracts, price schedules, price lists, pit prices, purchase orders, supplier lists and prices, discount policies and records, and all other records and documents of every kind from

January 1, 1949 to date with respect to:

A. "Purchasing, receiving, storing, producing, mixing, batching, soliciting, selling, distributing, delivering and installing sand, gravel, aggregate, cement, cement products, concrete and/or ready-mixed concrete, as well as materials and business generally related thereto" (complaint, ¶8) engaged in by all of the defendants or their predecessors or affiliates, with any and all of their respective customers and suppliers, and/or between themselves;

B. All mergers, acquisitions, sales or transactions with or between defendants and any of their affiliates, or any others therefor or thereof;

C. All rebates; discounts; services; merchandise, fill top soil, or other benefits or considerations to customers;

D. All market studies, surveys, reports or documents;

E. All gravel and/or aggregate surveys, studies, supplies, reserves or holdings, options;

Plaintiffs' Subpoena to Defendants.

F. All cost, efficiency, delivery or zone studies or reports;

G. All material, aggregate, product, concrete, sand or gravel tests, reports, or; state approvals.

H. All studies, reports or records concerning moisture content, size, classification, grading, suitability, or quality;

I. All market percentage reports, estimates, studies or surveys.

6. All other books, papers, documets and records concerning the subject matter of this action.

Dated: Buffalo, New York
June 28, 1973.

JOHN K. ADAMS
Clerk

RAICHLE, BANNING, WEISS & HALPERN

By_____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203

Plaintiffs' Motion to Quash Defendants' Subpoena.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

Civil No. 1970-277

vs.

MOTION TO QUASH AND/OR FOR A PROTECTIVE ORDER.

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

Plaintiffs move the Court for an order quashing the annexed subpoena dated June 27, 1973 to plaintiffs to produce documents on July 9, 1973; and/or for a protective order.

This motion is based upon:

A. The pleadings and proceedings heretofore had and taken herein, pursuant to which it was mutually agreed that the parties would exchange similar records;

B. Defendants' refusal to honor plaintiffs' subpoena for similar records;

C. The competitive conditions existing between the parties, and the unfair competitive advantage defendants would gain over plaintiffs by defendants' unilateral access to plaintiffs' vital records;

Plaintiffs' Motion to Quash Defendants' Subpoena.

D. The burdensome nature of defendants' subpoena and the irrelevance, immateriality and incompetency of the records sought, including but not limited to plaintiffs' income tax returns;

E. Plaintiffs' failure to have any discovery of defendants for the past three years, and defendants failure to answer plaintiffs' interrogatories.

Dated: Buffalo, New York
June 29, 1973.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

TO: CHARLES J. McDONOUGH, ESQ.
McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attorneys for Defendants
930 Walbridge Building
Buffalo, New York 14202

VICTOR E. MANZ, ESQ.
MANZ, MANZ & DIVIAK
Attorneys for Defendants
425 Statler Hilton Hotel
Buffalo, New York 14202

PLEASE TAKE NOTICE that by agreement of the parties this motion will be heard at the United States Court House, Niagara Square, Buffalo, New York, on July 5, 1973, at 10:00 A.M., or as soon thereafter as counsel can be heard.

Dated: Buffalo, New York
June 29, 1973.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

vs. Civil 1970-277

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

On July 5, 1973, the court considered oral argument on plaintiffs' motion filed June 4, 1973 entitled "Motion to Compel Discovery" and on plaintiffs' motion filed on July 3, 1973 to quash the subpoena of the defendants dated June 27, 1973.

The motion to compel discovery is denied with leave given to plaintiffs to refile, setting forth in particular fashion their claim for relief.

Plaintiffs' motion to quash the subpoena of defendants is denied. The deposition set for July 9, 1973 shall promptly proceed.

So ordered.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: July 6, 1973

Defendants' Motion for An Order Amending
Order Dated June 9, 1971.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY AND LOIS MUCK as co-executors
of the Estate of GEORGE C. FREY, DECEASED,
Plaintffs

vs
PINE HILL CONCRETE MIX CORP. CIVIL NO.1970-277
REGENT SAND & GRAVEL CORP.
LUDWIG F. KAHLE, JOSEPH PFOHL
PAUL M. PFOHL AND FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC,
a dissolved corporation, and
PFOHL BROTHERS, INC.,
Defendants

DEFENDANT PINE HILL CONCRETE MIX CORP., moves this court for an Order, amending this Court's Order of June 9, 1971, directing plaintiffs to pay for all products purchased by plaintiff at prices according to Price List of said defendant effective April 1, 1974, and to pay for increase in trucking costs effective March 1st, 1974.

DATED: BUFFALO, NEW YORK
June 21, 1974

MANZ, MANZ AND DIVIAK

By: Victor E. Manz
VICTOR E. MANZ
Attorneys for Defendants
Office and P. O. Address
425 Statler HIlton
Bufalo, New York, 14202

Defendants' Motion for An Order Amending
Order Dated June 9, 1971.

TO: ARNOLD WEISS, Esq.
RAICHLE, BANNING, WEISS & HALPERN
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York, 14203

CHARLES J. McDONOUGH, ESQ.
McDONOUGH, BOASBERG, McDONOUGH & BELTZ
Attorneys for Defendants
930 Walbridge Building
Buffalo, New York, 14202

PLEASE TAKE NOTICE that defendants will bring this motion on for argument at a Motion Term of this Court tobe held at the United States Court House, Niagara Square, Buffalo, New York, on MOnday, July 1, 1974, at 11:00 A.M. or as soon thereafter as counsel can be heard.

DATED: BUFFALO, NEW YORK,
June 21, 1974

MANZ, MANZ AND DIVIAK
BY: Victor E. Manz
VICTOR E. MANZ
Attorneys for Defendants
Office and P. O. Address
425 Statler Hilton
Buffalo, New York, 14202

Defendants' Motion for An Order Amending
Order Dated June 9, 1971.

STATE OF NEW YORK)
ss:
COUNTY OF ERIE)

VICTOR E. MANZ, being duly sworn, deposes and says:

1. Deponent is attorney for defendants herein;

2. CHARLES J. McDONOUGH, Esq., is the attorney of record for defendants, but deponent, as house counsel for the defendants has been authorized to proceed with this motion;

3. That an Order of the Court by United States District Judge JOHN T. CURTIN, on June 9, 1971, ordered defendants to sell and supply to plaintiffs the plaintiffs' reasonable requirements of concrete sand (grit) No. 1 gravel and No. 2 gravel at the then current prices, to wit:

Concrete sand (grit)	$3.50 per ton
No. 1 Gravel (5/8" top size)	3.00 per ton
No. 2 Gravel (1 - 1/4" top size)	2.75 per ton

4. That on or about February 28, 1974, a new price list effective April 1, 1974, reflecting increased costs to defendants was sent to plaintiffs as well as all other customers. A copy of said price list is hereto annexed; (SEE EXH. A)

5. That the price of No. 1 Gravel 1 5/8" top size has increased to $3.50 per ton and No. 2 Gravel 1 - 1/4" top size has increased to $3.25 per ton;

6. That on or about February 26, 1974, all customers of defendant PINE HILL CONCRETE MIX CORP., except plaintiffs were notified that trucking and delivery charges would be increased an average of 20 cents per ton effective March 1st, 1974; (see attached notice); (EXHIBIT B)

7. Your deponent has been informed that plaintffs refused to pay the increase in price for products delivered. Attached is plaintiff's letter of refusal, dated March 15, 1974;

(SEE EXHIBIT B-1)

Defendants' Motion for An Order Amending
Order Dated June 9, 1971.

WHEREFORE, defendants move this Court to grant an Order amending the Order of June 9, 1971, to incorporate defendants current prices list, effective April 1, 1974 and that plaintiff's be compelled to pay the increased costs of products retroactively to April 1, 1974 and be compelled to pay the increased trucking charges effective upon the granting of this Order.

Victor E. Manz

VICTOR E. MANZ

Sworn to before me this
21st day of June 1974

Anita Sanucci

ANITA SANUCCI, NOTARY PUBLIC, ERIE COUNTY
NEW YORK, MY COMMISSION EXPIRES MARCH 30,
1976

Defendants' Motion for An Order Amending
Order Dated June 9, 1971.

STATE OF NEW YORK)
ss.
COUNTY OF ERIE)

LUDWIG F. KAHLE, being duly sworn, deposes and says:

1. That he is the President of defendant PINE HILL CONCRETE MIX CORP;

2. That this affidavit is being submitted in support of motion to amend the June 9, 1971 Order of this Court to increase prices of products purchased by plaintiffs from said defendant and to increase trucking and delivery charges, 20 cents a ton;

3. On February 28, 1974, said defendant sent plaintiffs a new price list, with the February billing, showing the new prices for all products sold effective April 1, 1974; (Exh. A)

4. Plaintiffs have refused to pay the increase in prices unless ordered to by this Court; (Exh. A-1)

5. Said defendant also has increased its trucking and delivery charges - an average of 20 cents a ton - and all customers, except plaintiffs were notified on or about February 26, 1974. A copy of the notice will be sent to plaintiffs before July 1, 1974; (Exh. B)

6. Defendant also requests this Court to amend its Order of June 9, 1971 to reflect the increase in trucking of 20 cents a ton to plaintiffs;

7. Defendant has not increased its Price List or trucking charges since December 1, 1970. Attached is a copy of the December 1, 1970 Price List; (Exh. C)

8. Defendant has been caught in the current of spiraling increases in operating costs like all other business in this area and must increase its prices in order to survive;

9. Attached is a resume of typical cost increases on a comparative basis between the dates of 12/1/70 to 4/1/74. (Exh. D) Also attached is comparison of prices charged for the products sold to plaintiffs by defendant, reflecting the percentage of increase for the same period; (Exh. E)

Defendants' Motion . n C.. Amending
Order Dated June 9, 1971.

WHEREFORE, defendant requests the Court to amend the June 9, 1971 Order to increase prices according to the April 1, 1974 Price List retroactive to April 1, 1974 and increase trucking and delivery charges to 20 cents a ton effective with the granting of this Order.

CARL E. KAHLE

Sworn to before me this 24th
day of June 1974

NOTARY PUBLIC, ERIE COUNTY, NEW YORK

NORMAN M. MORAN
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1975

Defendants' Motion for An Order Amending Order Dated June 9, 1971.

PINE HILL CONCRETE MIX CORP.

OFFICE AND YARD - 2255 BAILEY AVENUE - BUFFALO, NEW YORK 14211 - TELEPHONE 716/894-2255

February 26, 1974

PRICE LIST - F.O.B. PIT - EFFECTIVE APRIL 1ST., 1974

WASHED & SCREENED SAND

ASPHALT SAND	$ 3.25	PER TON
BRICK SAND	3.25	" "
M3A MORTAR SAND	3.50	" "
CONCRETE SAND	3.50	" "
PLASTER SAND	3.50	" "

WASHED & SCREENED GRAVEL --

#1A ROOFING GRAVEL..(5/16" TOP SIZE)	$ 3.50	PER TON
#1 " ..(5/8" TOP SIZE)	3.50	" "
#2 " ..(1 1/4" TOP SIZE)	3.25	" "
#3 & 4 "	2.75	" "

WASHED & SCREENED CONGLOMERATE --

SIDEWALK MIX ..(5/8" TOP SIZE)	$ [illegible]	PER TON
CONCRETE MIX...(1 1/4" TOP SIZE)		"

BANK RUN GRAVEL OR BANK RUN SAND	$ 1.25	PER TON
-4" CRUSHED BANK RUN	1.75	" "
-3" " " "	1.75	" "
-2" " " "	2.00	" "
-1" " " "	2.00	" "
-3/4" " " "	2.00	" "

DIRT FILL - $2.00-$4.00-$6.00 PER LOAD	ACCORDING TO SIZE	
TOP SOIL	$ 1.50	PER YARD
LEACH BED FILL	1.50	" "

TRUCKING CAN BE ARRANGED. CHARGES UPON REQUEST.

THE RIGHT IS RESERVED TO LIMIT SHIPMENT OF SPECIFIC SIZES DUE TO PRIOR COMMITMENTS OR PRODUCTION LIMITATIONS

PIT LOCATIONS

SAND & GRAVEL	324 PAVEMENT ROAD, LANCASTER	683-6205
SAND & GRAVEL	GENESEE & SHISLER ROADS, LANCASTER	683-4224
BANK RUN	JONES & RANSOM ROADS, CLARENCE	759-8189

Controlled Quality

EXHIBIT "A"

244

Defendants' Motion for An Order Amending Order Dated June 9, 1971.

FREY CONCRETE, INC.

561 PAVEMENT ROAD
LANCASTER, N.Y. 14086
Phone 683-1432

May 15, 1974

Pine Hill Concrete Mix Corp.
2255 Bailey Avenue
Buffalo, New York 14211

Gentlemen:

Replying to your notice of February 26, 1974, we are complying with United State District Judge Curtain's court order dated June 9, 1971, and we will continue to comply with same.

Yours very truly,

(Mrs.)Lois Muck
Secretary-Treasurer

FREY CONCRETE, INC.

LM:bkd

cc: Mr. D. Goldstein
Mr. A. Weiss

***EXHIBIT A - 1**

Defendants' Motion for An Order Amending Order Dated June 9, 1971.

PINE HILL CONCRETE MIX CORP.

OFFICE AND YARD: 2250 BAILEY AVENUE • BUFFALO, NEW YORK 14211 • TELEPHONE 716/894-2255

February 26, 1974

NOTICE

We have been advised by the independent truckers who deliver our pit materials that the charges for delivery will be increased slightly (average 20¢ per ton) in all zones effective March 1st., 1974.

Upon request we will be glad to advise you the charges to any specific location.

PINE HILL CONCRETE MIX CORP.

"EXHIBIT B"

Controlled Quality

PINE HILL CONCRETE MIX CORP.

OFFICE AND YARD - 2255 BAILEY AVENUE - BUFFALO, NEW YORK 14211 - TELEPHONE 716/894-2255

December 1st, 1970

PRICE LIST - F.O.B. PIT - EFFECTIVE DECEMBER 1ST, 1970

WASHED & SCREENED SAND --

ASPHALT SAND	$ 3.00 PER TON
BRICK SAND	3.00 " "
M3A MORTAR SAND	3.50 " "
CONCRETE SAND	3.50 " "
PLASTER SAND	3.50 " "

WASHED & SCREENED GRAVEL --

#1A ROOFING GRAVEL ..(5/16" TOP SIZE)	$ 3.00 PER TON
#1 " ..(5/8" TOP SIZE)	3.00 " "
#2 " ..(1½" TOP SIZE)	2.75 " "
# 3 & 4 "	2.25 " "

WASHED & SCREENED CONGLOMERATE --

SIDEWALK MIX..(5/8" TOP SIZE)	$ 3.25 PER TON
CONCRETE MIX..(1½" TOP SIZE)	3.25 PER TON

BANK RUN GRAVEL OR BANK RUN SAND	$ 1.00 PER TON
-4" CRUSHED BANK RUN	1.50 " "
-3" " " "	1.50 " "
-2" " " "	1.75 " "
-1" " " "	1.75 " "
-3/4" " " "	1.75 " "

DIRT FILL - $2.00-$4.00-$6.00 PER LOAD	ACCORDING TO SIZE
TOP SOIL	$ 1.00 PER YARD
LEACH BED FILL	$ 1.00 PER YARD

TRUCKING CAN BE ARRANGED. CHARGES UPON REQUEST

PIT LOCATIONS

SAND & GRAVEL	324 PAVEMENT ROAD, LANCASTER	683-6205
SAND & GRAVEL	GENESEE & SHISLER ROADS, LANCASTER	683-4224
BANK RUN	JONES & RANSOM ROADS, CLARENCE	759-8189

"EXHIBIT C"

Controlled Quality

Defendants' Motion for An Order Amending Order Dated June 9, 1971.

June 18, 1974

TYPICAL COST INCREASES INCURRED BETWEEN PRICE INCREASES

DECEMBER 1, 1970 to APRIL 1, 1974 (40 months)

Diesel fuel (Atlantic Richfield)

12/ 1/70 $ .1335 per gal.
3/18/74 $ .359 per gal. up 169 %

Electricity (New York State Electric & Gas)

5/71 31040 kw. hrs. for $ 615.60 - $ .0198/kw. hr.
5/74 29120 kw.hrs. for $1052.17 - $ .0361/kw. hr. up 82 %

Wages (Operating Engineer)

12/70 $ 8.235 per hr.
6/74 $10.615 per hr. up 29 %

Processing Equipment parts & materials

Crusher parts (Stedman Foundry & Machine Co.)

2/15/71 # 20 8 pin cage $ 1225.00
3/ 7/74 # 20 8 pin cage $ 1609.00 up 31 %

Screen parts (Buffalo Wire Works)

1/ 8/71 5/8 sp. .192 Buffaloy $ 16.50
9/14/73 5/8 sp. .192 Buffaloy $ 20.70 up 25 %

Misc. Steel parts (Buffalo Structural Steel)

2/ 4/71 1/4 x 48" plate $ 10.70/ 100#
11/ 6/73 1/4 x 48" plate $ 13.25/ 100# up 24 %

Heavy Equipment (Syracuse Supply)

9/29/70 D8 Caterpillar tractor $ 70000.00
6/18/74 D8 Caterpillar tractor $109789.00 up 57 %

Taxes (92.57 Acres in Lancaster)

10/15/70 School $ 3435.45
2/16/70 County $ 3677.14
$ 7112.59 - $ 77.00 /acre

10/15/73 School $ 4002.65
2/15/73 County $ 5192.26
$ 9194.91 - $ 99.00 /acre up 29 %

"EXHIBIT D"

Defendants' Motion for An Order Amending Order Dated June 9, 1971.

PINE HILL CONCRETE MIX CORP. - PRICE INCREASES

DECEMBER 1, 1970 - APRIL 1, 1974 (40 MONTHS)

12/1/70 concrete sand	$3.50 /ton	
12/1/70 #1 gravel	3.00 /ton	
12/1/70 #2 gravel	2.75 /ton	
AVERAGE	3.08 /ton	
4/1/74 concrete sand	3.50 /ton	
4/1/74 #1 gravel	3.50 /ton	
4/1/74 #2 gravel	3.25 /ton	
AVERAGE	3.42	up 11%

"EXHIBIT E"

Plaintiffs' Cross-Motion to Compel Discovery.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., et al.

Plaintiffs,

CIVIL NO. 1970-277

vs.

CROSS-MOTION

PINE HILL CONCRETE MIX CORP., et al

Defendants.

PLEASE TAKE NOTICE that plaintiffs herewith submit their affidavits in opposition to defendants' motion dated June 21, 1974 for an order increasing the prices for gravel and trucking to plaintiff Frey Concrete.

PLEASE TAKE FURTHER NOTICE that on the return date of defendants' motion dated June 21, 1974, plaintiffs will cross-move the Court for an order directing defendants to appear and be deposed by plaintiffs and to produce their books, papers and documents, and staying consideration of defendants' said motion by the Court until such time as plaintiffs have had an opportunity to conduct discovery of said books, papers and records and conduct depositions of the defendants and their officers and employees.

Dated: Buffalo, New York
July 17, 1974.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203

Supporting Affidavit of A. Douglas Burg.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY and LOIS MUCK as co-executors
of the Estate of GEORGE C. FREY, Deceased,
Plaintiffs,

vs.

PINE HILL CONCRETE MIX CORP.,
REGENT SAND & GRAVEL CORP.,
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC.,
a dissolved corporation, and
PFOHL BROTHERS, INC.,
Defendants.

CIVIL NO. 1970-277

AFFIDAVIT
OF
A. DOUGLAS BURG

STATE OF NEW YORK:
ss
COUNTY OF E R I E:

A. DOUGLAS BURG, being duly sworn, deposes and says:

1. I am Sales Manager of plaintiff Frey Concrete, Inc. (being the corporation resulting from the merger of plaintiff George C. Frey Ready-Mixed Concrete, Inc. and plaintiff George C. Frey Batching Plant, Inc.).

2. I make this affidavit in opposition to the motion of Pine Hill Concrete Mix Corp., dated June 21, 1974, for an order increasing Pine Hill's prices for gravel and for trucking services supplied to plaintiff, and for an order amending this Court's order dated June 9, 1971.

3. As Sales Manager of Frey Concrete, Inc., I am in charge of Frey Concrete's sales efforts amongst its customers and I am required to stay in touch with Frey's customers and to maintain the latest available information concerning the prices quoted by Frey's competitors.

4. Pine Hill Concrete Mix Corp., by reason of its acquisition of Pfohl Brothers, Inc. became the supplier of Frey's requirements of gravel for use as an aggregate in its ready-mixed concrete. During all of this time, Pine Hill Ready-Mix Concrete was also the principal competitor of Frey Concrete in the sale of ready-mixed concrete. Thus, by acquiring Frey's source of gravel supply, and the ability to control the price of Frey's raw materials, Pine Hill illegally acquired the right to control Frey's ready-mixed concrete price and its profit and loss.

5. Pine Hill has sold itself gravel through the use of a wholly-owned subsidiary, the defendant Regent Sand & Gravel Corp. Frey Concrete has been unable in this litigation to obtain the books of either Regent Sand & Gravel or Pine Hill Concrete Mix Corp. relating to these gravel sales and the price paid by Pine Hill; but the matter may be academic because of the identity of the owners of Regent and Pine Hill.

6. Although Pine Hill is asking this Court to approve an increase in its price to Frey Concrete for gravel

and trucking, Pine Hill has not increased the prices which it is charging for ready mixed concrete and is attempting to induce Frey Concrete's customers to switch to Pine Hill.

7. For example, following the termination of the truck drivers' strike in 1971, Pine Hill and Frey Concrete issued new price lists to reflect the settlement achieved with the truck drivers.

8. This price list was maintained in effect from August 9, 1971 to April 1, 1974 by both Pine Hill and Frey; but because of constantly increasing prices it was necessary for Frey Concrete to issue a new price list on April 1, 1974. Pine Hill Concrete, however, continues to adhere to its August 9, 1971 price list, even in the face of the increased prices which it annexed to its present motion as Exhibit D.

9. It came to the deponent's attention that Pine Hill was making efforts to induce Frey Concrete's customers to cease doing business with Frey and start doing business with Pine Hill. Pine Hill attempted to induce customers by informing them that it was continuing to adhere to its August 9, 1971 price list (despite the admittedly large increases in raw materials, fuels, services and wages set forth in Exhibit D annexed to Pine Hill's motion).

10. Pine Hill attempted to induce over fifteen of Frey Concrete's concrete purchasing customers to switch from Frey

Concrete to Pine Hill by touting the fact that Pine Hill did not intend to raise its prices and would adhere to its August 9, 1971 price list throughout the 1974 season.

11. Deponent has been informed that a Frey Concrete customer, who desires to remain anonymous, was approached by Mr. Sam Prezioso, a salesman for Pine Hill, and informed that he should not continue to do business with Frey because Pine Hill would sell him concrete at the August 9, 1971 prices. Deponent has been informed that Mr. Prezioso handed the customer a Pine Hill August 9, 1971 price list and specifically informed him that for the indefinite future, and at least through 1974, the customer could get concrete for his wall jobs from Pine Hill for the August 9, 1971 price of $22.00 a yard rather than paying the Frey Concrete price of $23.70 per yard.

12. Prior to April 1, 1974, Frey Concrete charged $22.00 a yard for this type of concrete but because of the price increases which it had sustained, it was forced to raise the price $1.70 a yard.

13. For example, the August 1971 price of cement which is used in this concrete was $1.18 per bag. This was increased three times since that date, namely: to $1.26 per bag on February 1, 1974, to $1.36 per bag on May 1, 1974, and to $1.52 per bag on July 15, 1974. As an example, the cement for a "five-bag" mix would cost Frey (and Pine Hill) 34¢ more ($1.52 less $1.18) today, or $1.70 more per yard.

14. Therefore, Frey Concrete refrained from raising its prices despite these increases in cement and other components until April 1, 1974 when it was impossible to continue to maintain such an outmoded price. Frey raised the price of its wall concrete from $22.00 a yard to $23.70, but the increase of $1.70 per yard did not even equal the increase which it cost to produce this concrete. This does not even include the increased cost which would be required if Pine Hill was granted the increased gravel prices which it is asking from this Court which would cause Frey Concrete an increased production cost of 52¢ per yard.

15. As a result of Pine Hill sticking to its 1971 prices in the face of all of these increases -- including apparently the increased cost of gravel which it is asking this Court to approve -- Pine Hill has been able to induce a substantial number of Frey Concrete customers to switch to Pine Hill.

16. In my opinion, it is impossible for Frey Concrete to meet Pine Hill's price of $22.00 per yard for this concrete even without the presently requested price increase for gravel.

17. If this Court granted Pine Hill the increased gravel and trucking prices which it now seeks, it would cause even more grievous harm to our concrete wall business.

18. Similarly to Pine Hill's aforementioned action with respect to our wall customers is its actions with respect to attempting to take our commercial concrete business. In the quotation which Pine Hill has made to its commercial customers and to Frey Concrete's "commercial work" customers, Pine Hill has not shown any significant increase, and in fact has shown a decrease in many of its prices, thus far during 1974.

19. The intent of this "commercial work" anti-competitive policy by Pine Hill appears to be to prevent Frey Concrete from also obtaining any "commercial work . As a result, Frey Concrete has been unable, by several dollars, to meet many of Pine Hill's commercial bids for this year even without giving effect to the gravel and trucking price increases which Pine Hill is asking the Court to approve.

20. Pine Hills' conduct in maintaining its 1971 prices in the face of the current inflationary trend, and in fact cutting its 1971 price, has continued to a point where it appears to deponent that Pine Hill is selling below cost.

A. Douglas Burg

A. Doublas Burg

Sworn to before me this
17th day of July, 1974.

F. TERRY SZYMCZYK
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 76

Supporting Affidavit of Lois Muck.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY and LOIS MUCK as co-executors
of the Estate of GEORGE C. FREY, Deceased,

Plaintiffs,

-vs-

CIVIL NO. 1970-277

AFFIDAVIT
OF
LOIS MUCK

PINE HILL CONCRETE MIX CORP.,
REGENT SAND & GRAVEL CORP.,
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC.,
a dissolved corporation, and
PFOHL BROTHERS, INC.,

Defendants.

STATE OF NEW YORK:
ss
COUNTY OF E R I E:

LOIS MUCK, being duly sworn, deposes and says:

1. I am Treasurer, and also Secretary, of Frey Concrete, Inc., the plaintiff corporation resulting from the merger of plaintiff George C. Frey Ready-Mixed Concrete, Inc. and George C. Frey Batching Plaint, Inc.

Supporting Affidavit of Lois Frack.

2. I am involved in the day-to-day financial affairs of Frey Concrete and make this affidavit based on my familiarity with such affairs.

3. Ever since Pine Hill acquired our gravel supply in 1957, by acquiring Pfohl Brothers, I have been informed that it has adversely affected our business by various anti-competitiv practices, including unjustified increases in gravel prices, discriminatory price increases in strategic materials, price-cutting of concrete ready-mixed product, self-dealing in gravel on a more advantageous basis, discrimination in quality of material, overcharging by including excessive water, customer rebates of fill, services, waiting time and discount dates, and other related practices.

4. Some time shortly after February 26, 1974, Pine Hill Concrete sent us an increased price list dated February 26, 1974 and a notice of increased trucking cost also dated February 26, 1974.

5. Under our agreement with Pfohl Brothers, which was assumed by Pine Hill in 1957 when it bought out Pfohl, Pine Hill is required to give Frey notice of any proposed price increase before February 1st. Accordingly, the proposed increase is not timely.

6. This constitutes a repetition of Pine Hill's action in 1968 when it sent out on February 6, 1968 a notice of price increase which we rejected.

7. In any event, the agreement of May 17, 1949 (¶ 17, et al.) requires a mutual agreement as to any proposed price increase, and requires that the price conform to "prevailing pit prices" less the special 20% discount which was one of the considerations for Frey selling its gravel plant to Pfohl in 1949.

8. Under our agreement, and I believe before this Court, the proper procedure for Pine Hill to follow would be to survey the prevailing pit prices and exert good faith efforts to arrive at an equitable increase, if any is justified.

9. The spirit and intent of the May 17, 1949 agreement between Pfohl and Frey was to guarantee Frey a low cost constant supply, high quality, gravel delivered in its batching plant bins so as to enable it to remain competitive with Pine Hill and its other competitors despite the fact that it agreed to sell its washing plant and gravel plant to Pfohl Brothers.

10. However, when Pfohl Brothers sold to Pine Hill in 1957, Pine Hill did not carry out the spirit, intent and provisions of the agreement. Instead, Pine Hill attempted to utilize the agreement and Pine Hill's anti-competitive position

as the supplier of Frey's gravel, in an attempt to drive Frey out of the market, and to increase Pine Hill's share of the market.

11. One method by which Pine Hill sought to accomplish this was by refusing to keep updated the washing plant Frey sold to Pfohl Brothers and which Pine Hill then purchased on the premises adjoining the Frey batching plant.

12. Although Frey's washing plant which Pine Hill acquired was considerably closer to Pine Hill's gravel supply, Pine Hill kept all of its other gravel washing plants updated but did not keep Frey's washing plant updated.

13. As a result, the washing plant which Pine Hill acquired at the Frey site became incapable of supplying properly washed and graded sand and gravel and became incapable of supplying acceptable material. As a result, Frey Concrete lost many customers due to improperly washed, screened and graded gravel from this old-fashioned plant. At the same time, Pine Hill supplied itself with gravel from the updated washing plants and was able to take away a large number of Frey's customers.

14. The concrete grit which Pine Hill attempted to sell Frey under the order of this Court, dated June 9, 1971, was

so full of moisture and improperly sized and graded that Frey was no longer able to use this material. We thereupon decided to purchase our grit from other quarries and have since purchased no grit from Pine Hill.

15. Prior to the time that Pfohl Brothers sold the gravel business to Pine Hill, Pfohl Brothers had purchased new Eagle sand classification equipment for installation on the washing plant at the Frey site. However, when Pine Hill purchased the washing plant from Pfohl Brothers, Pine Hill sold off this updating equipment and made no other updating efforts on the washing plant. If Pine Hill had installed this Eagle sand washing equipment as Pfohl had intended, or had continued to update the Frey plant to the level that it updated its other plants, we would not have been forced to purchase our concrete grit from other sources.

16. Another anti-competitive tactic by Pine Hill with respect to the concrete grit was discriminatory and non-linear price increase of grit effective April 1, 1968. In 1967 and early 1968, Pine Hill was selling Frey at an agreed price of $2.20 for concrete grit and number two gravel and $2.40 for number one gravel, all less 20% discount, delivered to Frey's batching plant bins.

19. In 1974, Pine Hill is loading the increase on the other gravel components, namely: number one and two gravel which it is seeking to increase by 50¢ per ton -- and strangely enough not seeking an increase in the price of grit.

20. The May 17, 1949 agreement clearly comprehended mutual agreement on prevailing pit prices less a 20% discount to Frey on these gravel prices.

21. However, the prevailing pit prices of gravel have remained fairly constant. It can be said without fear of contradiction, that no gravel supplier in the past six years has raised its prices a fraction of the price increases sought by Pine Hill in 1968 when it sought a dollar increase in the price of grit, and in 1974 when it s eeks a fifty cent increase in the price of gravel.

22. It should be pointed out to the Court that Pine Hill may not have increased the price of grit because Frey has not been buying grit from Pine Hill because of the reasons previously mentioned in this affidavit, but has been buying its number one and two gravel from Pine Hill. Apparently, Pine Hill chose to tailor its increases to what Frey was buying from it and to thus further damage Frey's ability to compete with Pine Hill.

Supporting Affidavit of Lois Muck.

17. By its late notice of February 6, 1968, Pine Hill attempted to increase the grit price by a dollar and the number one and two gravel price by 10¢. Considering that Frey was the Pine Hill's only major consumer for concrete grit, aside from Pine Hill itself, this discriminatory non-linear increase which almost doubled the price of grit appeared an attempt to drive Frey out of the concrete ready-mixed business. This was one of the major predatory acts by Pine Hill which precipitated the present litigation. Numerous actions, including the present action, were instituted because of this discriminatory and unauthorized increase. It can be safely said that no other supplier of concrete grit or gravel substantially raised its prices.

18. The present Pine Hill request constitutes excellent evidence of the unjustified nature of the 1968 increase. If the 1968 increase cannot be justified, it must be based on Pine Hill's increased cost of production. However, the 1974 proposed increase -- during a period when there certainly had been inflationary increases in production -- finds Pine Hill not even seeking any increase in the price of concrete grit. The price is so high now that it is non-competitive and this seems to be Pine Hill's intent -- to keep Frey grom getting its essential ingredient of good quality concrete grit.

Supporting Affidavit of Lois Muck.

23. From the accompanying affidavit of A. Douglas Burg, Frey's Sales Manager, it can be seen that in the face of rising costs and proposals for increased gravel prices by Pine Hill, that Pine Hill is actually holding down, and even cutting, its concrete prices in its competitive efforts in the market in which it competes with Frey. When you consider that there is approximately three-quarters of a ton of grit and three-quarters of a ton of gravel in each cubic yard of concrete, and that since 1968 Pine Hill has attempted to raise its prices for grit from $2.20 per ton to $3.50 per ton, and for gravel from $2.40 to $3.50 per ton for number one gravel and from $2.20 to $3.25 per ton for number two gravel, the mandatory price increase in concrete, based on increased cost of grit and gravel alone, would be not less than $1.50. Considering only the most recent increase on number one and number two gravel, it mandated an increase of approximately 31¢ per yard.

24. We have still been unable to obtain, in pretrial discovery, access to the defendants' books to learn just what prices, expenses and increased expenses are involved in the production of gravel by Pine Hill and its subsidiary Regent, and at what price Pine Hill is causing Regent to sell to itself. It is also necessary in the pretrial discovery to examine to the effect of Pine Hill using its garbage dumping business to subsidize these anti-competitive price offensive against Frey Concrete.

25. I have been informed that not only does Pine Hill use the garbage site for tying-in concrete business with rebates of free fill, but that it operates its ready-mixed business and/or Regent's gravel business at a loss and subsidizes the loss with its profits on its garbage operations.

26. I have been further informed that Pine Hill's attorneys have indicated that they will refuse to allow Frey's attorneys to examine into these matters and I request the Court direct that we be granted such an opportunity for discovery.

27. But for this Court's order of June 9, 1971, the price of gravel would not have been, and should not have been equitably fixed at the prices set forth in defendants' 1970 price list. The prevailing pit prices and Pine Hill's cost for the production of gravel do not justify these prices much less the proposed 1974 increases.

28. On the trial of this action, we will offer evidence to show that Pine Hill's 1970 price list, and doubly so its 1974 price list, are inordinately high. Pine Hill was certainly entitled to an increase in price over its 1967 price list <u>if</u> based on the increased costs in prevailing pit prices in other area quarries and based on increased costs sustained by Pine Hill. Considering improved production techniques and efficiency, Pine Hill's increased 1974 prices over 1967 prices should be very much lower than the prices now prevailing under this Court's order of June 9, 1971.

Supporting Affidavit of Lois Muck.

29. The best proof of this annexed tabulation of the prices at which other gravel pits in this area are willing to sell, and are selling gravel to Frey Concrete. It will be noted from this tabulation that the price that we have paid for gravel has not changed substantially in the pits listed. I suggest that the Court consider delaying Pine Hill's request for an increase in its prices to Frey until such time as we have had an opportunity to look at Pine Hill's and Regent's books and determine at what price Pine Hill has been purchasing its gravel from itself or its subsidiary Regent; and determine to what extent Pine Hill's cost of gravel production has increased. We question whether Pine Hill should have had any greater percentage increase in the cost of gravel production than the other gravel producers from whom we have been purchasing gravel.

30. With respect to the trucking increase which Pine Hill has requested from seventy cents per ton to ninety cents per ton, I would certainly not dispute that trucking costs have increased. However, our agreement provided that there was to be no trucking charge, and the Court's order of June 9, 1971 provided a contingent trucking cost of seventy cents per ton to be held in escrow. At present, more than $100,000.00 of our money is being held in escrow under this provisional arrangement, and we have need for this money in the operation of our business,

particularly in view of Pine Hill's present tactic of refusing to raise its prices, and even cutting its prices, to our customers, for ready-mixed concrete and, thus, taking away a substantial number of our customers.

31. The agreement of May 17, 1949 contemplated that Pfohl Brothers (and now Pine Hill as its successor) would keep our batching plants filled with gravel by delivering gravel into the bins on a continuous basis during working hours. It was on this basis that Frey sold its gravel business to Pfohl Brothers. No trucking charge was contemplated. In fact, no trucking charge was even justified because the arrangement gave Pfohl Brothers (and now Pine Hill) a valuable right, namely: the ability to immediately dispose of the gravel at the washing plant site without having to truck it and store it at a distant site and holding it for future sale and then rehandling it one or more times.

32. In view of the current financial situation prevailing in the Court, and our inability to compete with Pine Hill and meet its price cutting, we request that this Court rescind its requirement for a payment of trucking charge in escrow, and direct that the money be repaid to Frey Concrete, since the same was never contemplated by our agreement. As an alternative, we request that the Court discontinue the trucking charge but allow the present escrow balance of over $100,000.00 to remain on deposit with no further additions.

33. Even if a trucking charge were contemplated by the agreement and proper under the circumstances, Pine Hill would not be entitled to seventy cents per ton much less the proposed increase to ninety cents per ton for the following reasons.

34. In the first place, we have been unable to inspect Pine Hill's books to determine if it is charging itself a trucking expense or is paying anyone else a trucking expense, for the gravel which it delivers to its own concrete batching plants Since it is prohibited from engaging in any anti-competitive acts, being as it is, our gravel supplier and having acquired our gravel washing plant, Pine Hill cannot expect us to pay an expense that it itself does not sustain in producing concrete. We, therefore, ask the Court to defer any consideration of this trucking increase, as well as the gravel increase, until we have examined Pine Hill's books, and we request that this Court direct Pine Hill to forthwith grant us access to its books for this purpose. In the second place, I have been informed that Pine Hill does not hire an outside trucker to truck the gravel to our bins, but instead is using its own employees and equipment. This requires computation of its actual cost experience in performing this trucking. In the third place, Pine Hill does not deadhead back into the gravel pits after filling our

bins, but takes on a load of gravel across the street at its Peppermint-Pavement Road pit and delivers it to one of its washing plants. This, of course, would cut in half the trucking expense, assuming the same were justified or provided for by our agreement.

35. Since Pine Hill is our largest competitor, and vice versa, and since Pine Hill is continuing to maintain its 1971 prices, and even to reduce its prices, in the face of the same increases in cost that it is citing on this application to the Court, it seems to us that Pine Hill is not acting in good faith and is attempting to use this Court to sanction its anti-competitive acts against Frey Concrete.

36. I wish to cite in further support of this conclusion, the 1968 exorbitant and non-linear increase in concrete grit when this was our sole source of supply of grit; and the present tactic of not asking an increase of grit price but going after a substantial and unjustified gravel increase because this is the only thing that we now buy from Pine Hill and we are their sole major customer for gravel for use as concrete aggregate.

37. It appears that Pine Hill's application is not in good faith and that in any event should be deferred until

our attorneys can have a long-awaited opportunity to finally see Pine Hill's and Regent's books and records and especially the books and records pertaining to the present motion to increase prices.

Lois Muck

Sworn to before me this 17th
day of July, 1974.

F. TIBBY SZYMCZYK
Notary Public, State of New York
Qual. Nod in Erie
My Commission Expires 30, 1976

Supporting Affidavit of Lois Muck.

COMPARISON OF FREY'S GRIT & GRAVEL PRICES

SUPPLIER	YEAR	CONCRETE GRIT (20% + 2%) PIT PRICE	CONCRETE GRIT (20% + 2%) NET PRICE	NO. 1 GRAVEL PIT PRICE	NO. 1 GRAVEL NET PRICE	NO. 2 GRAVEL PIT PRICE	NO. 2 GRAVEL NET PRICE
Defendant PINE HILL	1967	2.20	1.725	2.40	1.882	2.20	1.725
	1968-69	3.20	2.509	2.50	1.960	2.30	1.803
	1970-74	3.50	2.744	3.00	2.352	2.75	2.156
	(Proposed 1974)	3.50	2.744	3.50	2.744	3.25	2.548
DAN GERNATT	1969	-	1.30	-	-	-	-
	1970	-	1.45	-	-	-	-
	1971-74	-	1.65	-	-	-	-
GENERAL CRUSHED STONE (Machias Plant).	1968	-	1.35	-	1.35	-	1.35
	1969	-	1.40	-	1.40	-	1.40
	1970	-	1.30	-	1.50	-	1.50
	1971	-	1.30	-	1.45	-	1.45
	1972	-	1.30	-	1.50	-	1.50
	1973-4	-	1.30	-	1.55	-	1.55
BUFFALO SLAG CO. (Franklinville Plant)	1969	-	1.30	-	1.30	-	1.30
	1970	-	1.30	-	1.30	-	1.30
	1971	-	1.50	-	1.50	-	1.30
	1972	-	1.50	-	1.50	-	1.50
	1973-4	-	1.30	-	1.20	-	1.20

Supporting Affidavit of Arnold Weiss.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased,

Plaintiffs,

CIVIL NO. 1970-277

vs.

AFFIDAVIT OF ARNOLD WEISS

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

STATE OF NEW YORK:
ss
COUNTY OF E R I E:

ARNOLD WEISS, being duly sworn, deposes and says:

1. I am a member of the firm of Raichle, Banning, Weiss & Halpern, attorneys for plaintiffs herein. I have had charge of this action and am familiar with the facts and circumstances hereof.

Supporting Affidavit of Arnold Weiss.

2. Defendants have conducted lengthy pretrial examinations of plaintiffs by their officers and employees during which they have taken many hundreds of pages of testimony.

3. Defendants have examined all of the books, papers and records of the plaintiffs and have been given copies of all the documents which they requested.

4. Each time deponent requested that plaintiffs be allowed to commence their depositions and discovery of the defendants, defendants' counsel has refused and cited additional witnesses and papers which he desired to have plaintiffs produce and each time deponent has allowed defendants' attorneys to conduct additional discovery and depositions.

5. Last week deponent again asked for the right to proceed on behalf of plaintiffs and commence their discovery.

6. Victor Manz, Esq., defendants' attorney, again refused, stating there were more documents to be examined. Deponent informed Mr. Manz that all of the documents had been made available and that any documents which defendants had not seen were awaiting examination at the Frey Concrete offices. Defendants' representative, Mr. Moran, is now in the process of examining said documents and should complete his examination before the end of this week.

7. Mr. Manz also requested additional depositions of the plaintiffs. Deponent asked Mr. Manz to defer these until plaintiffs conducted their discovery and depositions, or at least until plaintiffs had started their discovery. Mr. Manz refused.

8. Defendants have had full access to plaintiffs' costs of gravel and other materials, and cost of production, and with this knowledge now seek to increase the price for the gravel which Frey Concrete is purchasing from defendants.

9. On the other hand, defendants are stalling plaintiffs' request to discover defendants' costs of materials, including the cost of producing the gravel for which they seek an increase.

10. It is clear from the annexed affidavits that any increase in Pine Hill's gravel price will make Frey less competitive and it will lose additional customers to Pine Hill, especially since Pine Hill is persisting in maintaining lower concrete prices despite its own admission and claim that the cost of production has increased.

11. This appears to be a further attempt by Pine Hill to monopolize the market. If Pine Hill is indeed entitled to an increase because of all the increases in the cost of materials

set forth in Exhibit D annexed to his present application, how can it justify its own refusal to raise concrete prices in view of the fact that said concrete prices are dependent on the price of gravel and each of the other items set forth in Pine Hill's Exhibit D.

12. Without plaintiff being able to commence its own discovery of Pine Hill, it is difficult for plaintiff to specifically reply to this motion. In fact, it may be that Pine Hill's attempted price increase, its maintenance of lower concrete prices, and its reluctance to allow plaintiffs discovery, are part of an overall anti-competitive effort for which it may be seeking the inadvertent aid of this Court.

13. For these reasons, deponent submits that defendants' request should be denied, or in the alternative, consideration thereof deferred until plaintiffs have had an opportunity to conduct their own discovery of defendants, and their books, papers and records; and further that defendants should be directed to appear for their depositions and to produce all of the books, records and papers which concern or are relevant to the issues herein.

Arnold Weiss

Sworn to before me this
17th day of July, 1974.

F. TERRY SZYMCZYK
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19...

Affidavit of Norman M. Moran.

Del. Rec.
9/6/74
4:10 PM -

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., AND
HERBERT FREY AND LOIS MUCK as co-executors
of the ESTATE OF GEORGE C. FREY, deceased

Plaintiffs

vs

PINE HILL CONCRETE MIX CORP.
REGENT SAND & GRAVEL CORP.
LUDWIG F. KAHLE, JOSEPH PFOHL
PAUL M. PFOHL AND FIDELIS H.
PFOHL, individually and as the
controlling and surviving Directors,
officers, Shareholders, Liquidators and
Receivers of the assets of PFOHL BROTHERS,
INC., a dissolved corporations, and
PFOHL BROTHERS, INC.,

Defendants

CIVIL NO. 1970-277

AFFIDAVIT OF
NORMAN M. MORAN

STATE OF NEW YORK)
ss:
COUNTY OF ERIE)

NORMAN M. MORAN, being duly sworn, deposes and says:

1. That I am the comptroller of PINE HILL CONCRETE MIX CORP. and am familiar with all phases of its business and with this proceeding;

2. PINE HILL categorically denies the self-serving false allegations contained in Paragraph "3" of LOIS MUCK's affidavit, in which she alleges that PINE HILL has engaged in anti-competitive practices;

3. It is evident after reading the answering affidavits submitted in answer to PINE HILL's motion to amend the June 9, 1971 order, that an attempt is being made to confuse the simple issue involved in this motion;

4. The issue is whether PINE HILL has the right to increase its retail prices for materials sold and increase its charge for trucking materials to the customers, by simply informing all its customers or whether permission and an Order of this Court is required to increase the said prices and trucking charges when dealing with FREY CONCRETE;

5. It is the contention of PINE HILL that no such Order is required to increase price for materials sold. However this motion is being made because FREY CONCRETE refuses to pay the increased gravel prices on the new price list dated February 26, 1974 effective April 1, 1974 and which was sent to all its customers including FREY CONCRETE INC;

6. The Order of this Court dated June 9, 1971 directs PINE HILL to sell "at the current retail prices charged by PINE HILL CONCRETE for said materials" and then the order quotes the current retail prices in effect from PINE HILL CONCRETE MIX CORP's price list to wit: "Concrete sand (grit) 3.50 per ton No. 1 gravel (5/8 top size) $3.00 per ton; No. 2 gravel (1-1/4 top size $2.75 per ton.

The Court also ordered certain discounts which are not in question here;

7. The Order does not direct the prices remain at the stated prices forever but rather that PINE HILL CONCRETE be directed to sell to FREY CONCRETE INC.,"at the current retail prices charged by PINE HILL for said materials". It would be inequitable and unrealistic to imply that PINE HILL can raise its prices to all other customers except FREY CONCRETE INC., without the permission of this Court. The Court's quoting the specific prices was just that - a quote from the current retail price list;

8. PINE HILL conceded that permission of this Court is required to raise the trucking charges because a specific sum of 70 cents a ton was set by this Court in its June 9, 1971 ORDER WITH THE FURTHER DIRECTION THAT THE amount be held in a joint "escrow account until further order of this Court".

9. The reason for this distinction is that the Court felt the trucking charge was in dispute and would have to be decided on trial whereas there was no question that FREY CONCRETE INC. had to pay the same prices for materials as all other customers of PINE HILL;

10. It must also be remembered that PINE HILL was directed to supply the two types of gravel and the sand (grit) to FREY CONCRETE INC., by the May 7, 1971 and June 9, 1971 Orders of this Court after PINE HILL stopped delivery of materials to FREY CONCRETE in February 1971 when FREY CONCRETE INC., refused to pay the increases in the Price List dated and effective December 1, 1970;

11. In the event the Court should find PINE HILL must show that in order to charge FREY CONCRETE higher prices for materials, it must justify the increase by showing increased costs to it, the moving papers previously submitted have documented well PINE HILL's reasons for increasing its prices to all its customers. In fact the Court can take judicial notice that costs of production has gone up in all industries in recent years;

12. FREY CONCRETE is not being singled out by PINE HILL. It is being treated equally with all customers;

13. FREY CONCRETE has also increased its prices over the last ten (10) years to meet increased costs as have other concrete mix and gravel suppliers;

14. As a matter of survival it is essential that FREY CONCRETE be compelled to pay the same price for gravel that all other PINE HILL customers pay. We are presently giving them a 20% plus 2% discount and to receive less than the current retail price from FREY CONCRETE would be devastating as FREY CONCRETE is the sole customer supplied from the Pepperment Road gravel plant and PINE HILL's largest customer;

15. IT should be remembered that we are being compelled by the Court, as demanded by FREY CONCRETE, to sell gravel to FREY CONCRETE. If FREY CONCRETE desires to buy all of its gravel needs instead of part, from the many other available sources, PINE HILL has no objection;

16. In the event PINE HILL charges FREY CONCRETE less for gravel than other customers,would not this be unfair competition and subject PINE HILL to prosecution and ther law suits?

17. Your deponent certifies that PINE HILL is acting in good faith and respectfully requests that FREY CONCRETE be ordered to pay the increase prices effective April 1, 1974 for gravel and trucking and request that they be retroactive to April 1, 1974.

18. Your deponent has read the affidavit of LUDWIG P. KAHLE dated June 24, 1974 and submitted with the moving papers and agrees with the information and documents attached and contained therein. They are factual and accurate.

Norman M. Moran

NORMAN M. MORAN

Subscribed and Sworn to
before me this 6 day
of September 1974

Milton Mann

NOTARY PUBLIC, ERIE COUNTY, NEW YORK
MY COMMISSION EXPIRES MARCH 30, 1976

Affidavit of Robert E. Jones.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., AND
HERBERT FREY AND LOIS MUCK as co-executors
of the ESTATE OF GEORGE C. FREY, DECEASED,

Plaintiffs

vs
PINE HILL CONCRETE MIX CORP.
REGENT SAND & GRAVEL CORP.
LUDWIG F. KAHLE, JOSEPH PFOHL
PAUL M. PFOHL AND FIDELIS H.
PFOHL, individually and as the
controlling and surviving Directors,
Officers, Shareholders, Liquidators and
Receivers of the assets of PFOHL BROTHERS,
INC., a dissolved corporation, and
PFOHL BROTHERS, INC.,

Defendants

CIVIL NO. 1970-277

AFFIDAVIT OF
ROBERT E. JONES

STATE OF NEW YORK)
ss:
COUNTY OF ERIE)

ROBERT E. JONES, being duly sworn, deposes and says:

1. That he is in charge of production of gravel and sand (grit) for PINE HILL CONCRETE MIX CORP., and is familiar with this proceeding and with the allegations made by FREY CONCRETE INC. officials in their affidavits;

2. The allegations of poor quality of materials furnished and of failure to maintain the gravel washing plant used to wash and grade gravel sold to FREY CONCRETE are unfounded and untrue;

3. PINE HILL CONCRETE MIX CORP. uses the concrete sand (grit) from the same washing plant on Peppermint Road in its business and has never had any problems, except minor ones that arise in all gravel business occasionally;

4. Concerning the necessity for raising prices for gravel and not concrete sand (grit), the obvious fact is that in this period of inflation and rising production costs, it is necessary to raise prices.

5. No price increase is asked for concrete sand (grit) because PINE HILL has a large supply of concrete sand (grit) and this is caused by FREY's CONCRETE's refusal unjustifiably to buy our sand;

6. PINE HILL has three gravel plants running presently and in order to produce No. 1 and No. 2 gravel you must produce concrete sand (grit) which is an intregal part of production, therefore one half of the cost of operating a gravel plant is allocated to concrete sand (grit). As indicated, sand is not selling and to raise the prices of sand would be bad business;

7. Concerning the production of No. 1 and No. 2 gravel which is what FREY CONCRETE purchases from PINE HILL presently, this gravel is in big demand by all concrete mix companies and is often in short supply;

8. PINE HILL has occasionally since 1973 to the present, had to purchase 5/8 gravel from SPENCER-HALEY of Delavan, New York, for its own needs;

9. IT IS UNFAIR FOR PINE HILL to be compelled to sell No. 1 and No. 2 gravel, which is in short supply to FREY CONCRETE and have FREY CONCRETE refuse to buy our sand (grit) which is automatically produced as an integral part of gravel production. FREY CONCRETE is PINE HILL's largest customer and used to buy all of its grit from PINE HILL. By its refusal to purchase grit this has caused the large inventory and has been one of the factors in requiring the price increase for gravel;

10. FREY CONCRETE's charges of a PINE HILL plot to discriminate against it, as alleged in the affidavit of LOIS MUCK, are unwarranted and unfounded. All decision on production and price increase are based on the hard realities of business costs and conditions;

11. The Peppermint Road washing plant which FREY CONCRETE complains about, has been modernized, improved and kept in good repair since it was acquired in 1957. It is presently in better condition than when it was acquired;

12. It is interesting to note FREY CONCRETE had no complaints about the quality of materials from the plant until after law suits were started in 1969;

13. FREY CONCRETE has also increased its prices for concrete mix in the past ten years as has every other concrete mix company and producer of gravel products in the western New York area;

14. As shown in the supporting affdavit and documents of LUDWIG E. KAHLE submitted with the original motion, cost increases from December 1, 1970 to April 1, 1974 have increased from 24% to 169%.

Robert E. Jones
ROBERT E. JONES

Subscribed and Sworn to
before me this 6th day
of September 1974

NOTARY PUBLIC, ERIE COUNTY, NEW YORK
MY COMMISSION EXPIRES MARCH 30, 1975

Affidavit of Melvin E. Becker.

STATE OF NEW YORK)
ss:
COUNTY OF ERIE)

CIVIL NO. 1970 - 277

AFFIDAVIT OF
MELVIN E. BECKER

MELVIN E. BECKER, being duly sworn, deposes and says:

1. I am familiar with and am in charge of sales for PINE HILL CONCRETE MIX CORP., and am familiar with this proceeding;

2. That I have read the affidavit of A. DOUGLAS BURG, Sales Manager for FREY CONCRETE and this affidavit is made in answer thereto;

3. PINE HILL has never engaged in any illegal, unfair or unethical practices against any of its competitors;

4. The concrete mix business is very competitive and all concrete mix companies do have over-lapping relationship with the same customers;

5. Specifically we do compete with FREY CONCRETE and on occasions have successfully won jobs with customers they have dealt with. PINE HILL has never taken away a customer 100% of the time from FREY CONCRETE;

6. FREY CONCRETE has also been successful in winning bids or jobs with customers that PINE HILL has dealt with over the years. No one ready-mix company can say a certain customer is his;

7. The same applies to other competitors - union and non-union;

8. PINE HILL does not control FREY CONCRETE's source of supply. It is obvious that FREY CONCRETE buys from other suppliers of aggregate at cheaper prices than PINE HILL can sell for and also FREY CONCRETE has its own gravel source in Genesee County;

9. Concerning sale of ready-mix based on published price lists, it is misleading as stated by MR. BURG;

10. Rarely will a ready mix company, including FREY CONCRETE, sell at the price quoted in its price list. Many other factors are involved which enter into the actual price charged for ready-mix. It is traditional in the business to give discounts under certain circumstances. FREY CONCRETE and all other competitors do this.

11. Under present economic conditions and because of advantages non-union competitors have over PINE HILL it would be suicidal for PINE HILL to increase its list price for ready-mix as MR. BURG suggests;

12. MR. BURG's comments concerning the price of concrete for "wall jobs" and "commercial work" are erroneous, misleading and not pertinent to this proceeding;

13. Concerning the allegation of LOIS MUCK in her affidavit in paragraph "3" relating to "various anti-competitive practice" of PINE HILL, these allegations are untrue. PINE HILL does nothing different than FREY CONCRETE or their other competitors.

Melvin E. Becker

MELVIN E. BECKER

Subscribed and sworn to
before me this 16 day
of September 1974

NOTARY PUBLIC, ERIE COUNTY, NEW YORK
MY COMMISSION EXPIRES MARCH 30, 1975

Affidavit of Victor E. Manz.

CIVIL NO. 1970 - 277

STATE OF NEW YORK)
COUNTY OF ERIE)

AFFIDAVIT OF VICTOR E. MANZ

VICTOR E. MANZ, being duly sworn, deposes and says:

1. That I am house counsel for PINE HILL CONCRETE MIX CORP., and I was asked to present this motion by the late CHARLES J. McDONOUGH, attorney of record for PINE HILL and am familiar with the facts of this proceeding;

2. PINE HILL has almost completed its discovery proceeding of plaintiff and its officers and employees;

3. Based on information and testimony disclosed in the examination of plaintiff's books and records, a short period of time is required to finish after which plaintiff is free to commence its discovery proceedings;

4. There is one additional problem which has arisen since this motion was commenced and that is that MR. McDONOUGH died and your deponent is in the process of obtaining the file from his firm;

5. After the file is obtained it will be turned over to new counsel to be substituted in this action;

6. PINE HILL and your deponent will need time to brief new counsel with the facts and circumstances of this action;

7. It is not known at this time whether your deponent or new counsel will handle the examination of PINE HILL's officers and employees;

8. It seems to your deponent that the whole matter, except the immediate motion before the Court, should be held

in abeyance until new counsel is obtained and oriented.

Victor E Manz

VICTOR E MANZ

Subscribed and Sworn to

before me this 6th day of

September 1974.

Anita Sanucci

ANITA SANUCCI, NOTARY PUBLIC, ERIE
COUNTY, NEW YORK, MY COMMISSION
EXPIRES MARCH 30, 1976

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

vs. Civil 1970-277

PINE HILL CONCRETE MIX CORP., et al
~~RECORT SAND & GRAVEL CORP.~~

By order of June 9, 1971 the court set a time-table for discovery and the taking of depositions. It is obvious that neither side has complied with the order. At this time it is immaterial what the causes of non-compliance are, but further delay will not be tolerated.

The supervision of discovery and depositions is referred to United States Magistrate Edmund F. Maxwell, who shall see to it that remaining discovery proceeds with dispatch, giving such orders as are necessary to assure that this case is prepared for trial without any further delay.

The Magistrate may direct counsel to have substitute counsel available for depositions if they are otherwise engaged, may direct depositions to be held in the United States Court House under his personal supervision if he desires, or take whatever other steps are necessary to conclude this long-drawn-out discovery process.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: October 16, 1974

Plaintiffs' Notice of Depositions.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC.; and HERBERT FREY and LOIS MUCK as Co-Executors of the ESTATE OF GEORGE C. FREY, Deceased,
Plaintiffs,

vs.

Civil Action
No. 1970-277

PINE HILL CONCRETE MIX CORP.; REGENT SAND & GRAVEL CORP.; LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL, and FIDELIS H. PFOHL, individually and as the controlling and surviving directors, officers, shareholders, liquidators and receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation; and PFOHL BROTHERS, INC.,
Defendants.

NOTICE OF TAKING DEPOSITIONS

PLEASE TAKE NOTICE that pursuant to the order of this Court dated October 16, 1974, and subject to the supervision thereof by United States Magistrate Edmund F. Maxwell, plaintiffs will take the depositions of the defendants individually and by their respective officers, directors, employees and agents having knowledge of the facts, commencing with the deposition of the defendant Ludwig Kahle, and followed by the depositions of Norman Moran and of the remaining witnesses, commencing at 10:00 A.M. on Friday, October 18, 1974 at Room 1400, 10 Lafayette Square, Buffalo, New York, or at such other location as the United States Magistrate may direct. You are invited to attend and cross-examine.

Dated: Buffalo, New York
October 16, 1974.

RAICHLE, BANNING, WEISS & HALPERN

By_____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs

Magistrate's Order of October 22, 1974.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

By Order of October 16, 1974 the Court referred the supervision of discovery and depositions to the United States Magistrate. The Magistrate met with all counsel on October 21, 1974 at which time extended discussion was had concerning the status of the case and of discovery proceedings. The Magistrate was advised that the defendants intended to conclude the depositions of Herbert Frey and Mrs. Lois Muck, and to depose Mr. Douglas Burg and Mrs. George Frey. The defendants reported that discovery of plaintiffs' records had been completed subject to such additional information as might be developed on deposition.

Plaintiffs' counsel requested immediate access to the records of defendants and indicated an intention to depose Messrs. Norman Moran, Ludwig P. Kahle, Robert Jones, S. Prezioso and Melvin Becker. Plaintiffs sought an Order for concurrent depositions. Over the objection of plaintiffs' counsel, the Magistrate made the following determination pursuant to the Order of the Court dated Octob· 16, 1974:

1. The above-mentioned depositions of plaintiffs are to be completed by November 29, 1974;

2. Following the conclusion of the aforementioned examinations of plaintiffs by defendants, but in no event later than December 6, 1974, plaintiffs are to be granted access to appropriate books and records of defendants;

3. Plaintiffs' depositions of defendants shall commence during the week of December 2, 1974; and

4. The case shall be ready for trial by March 1, 1975.

So Ordered.

/s/ Edmund F. Maxwell

EDMUND F. MAXWELL
United States Magistrate

Plaintiffs' Motion to Change Parties.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

CIVIL NO. 1970-277

vs.

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

MOTION TO CHANGE PARTIES

Plaintiffs move the Court to change the name of the plaintiffs George C. Frey Ready-Mixed Concrete, Inc., George C. Frey Batching Plant, Inc., to the single name Frey Concrete, Inc which is the corporation resulting from the merger of said plaintiff corporations and is the subsisting corporation thereof.

Plaintiffs move the Court to add as parties defendant herein, defendants subsidiary and/or affiliated corporations which perform the trucking and landfilling operations herein,

namely: Quadco Hauling Corp., which transports the gravel from defendants' washing plants to plaintiffs' concrete bins, and Lancaster Sanitary Landfill, Inc., which is used by defendants to subsidize their below-costs sales of concrete and the provision and/or donation of dirt fill for use as rebates or tying devices for concrete customers.

This motion is based upon the affidavits of Lois Muck, sworn to July 17, 1974 and September 13, 1974, the affidavit of Herbert G. Frey, sworn to October 24, 1974, the proceedings of this Court held October 16, 1974, and all of the pleadings and proceedings heretofore had and taken herein.

Dated: Buffalo, New York

October 27, 1974.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

TO: VICTOR E. MANZ, ESQ.
MANZ & MANZ
Attorneys for Defendants
425 Statler Hilton
Buffalo, New York 14202

VICTOR T. FUZAK, ESQ.
HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
Attorneys for Defendants
One M & T Plaza
Buffalo, New York 14203

Plaintiffs' Notice of Argument of Appeal and Motion to Change Parties.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

CIVIL NO. 1970-277

NOTICE OF ARGUMENT OF APPEAL AND MOTION.

PLEASE TAKE NOTICE that plaintiffs motion to change parties, and plaintiffs' notice of appeal from the order of Magistrate Edmund F. Maxwell will be brought on for argument at a motion term of this Court to be held on Tuesday, October 29, 1974 at 11:00 A.M. at the United States Courthouse, Niagara Square, Buffalo, New York.

Dated: Buffalo, New York
October 22, 1974.

Plaintiffs' Notice of Argument of Appeal and Motion to Change Parties.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

TO: VICTOR E. MANZ, ESQ.
MANZ & MANZ
Attorneys for Defendants
425 Statler Hilton
Buffalo, New York 14202

VICTOR T. FUZAK, ESQ.
HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
Attorneys for Defendants
One M & T Plaza
Buffalo, New York 14203

Opposing Affidavit of Herbert G. Frey.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY and LOIS MUCK as co-executors
of the Estate of GEORGE C. FREY, Deceased,
Plaintiffs,

vs.

CIVIL NO. 1970-277

PINE HILL CONCRETE MIX CORP.,
REGENT SAND & GRAVEL CORP.,
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC.,
a dissolved corporation, and
PFOHL BROTHERS, INC.,
Defendants.

AFFIDAVIT

STATE OF NEW YORK:
ss
COUNTY OF E R I E:

HERBERT G. FREY, being duly sworn, deposes and says:

1. I am the president of Frey Concrete, Inc., the plaintiff herein.

2. I have been informed that Norman Moran, the comptroller of defendant Pine Hill Concrete Mix Corp., in his testimony given before the Court on Wednesday, October 16, 1974, stated that Pine Hill delivered grit and gravel to Frey

Concrete's hoppers by means of independent truckers who each owned and drove his own truck; and that Pine Hill was charged, and allegedly paid said independent truckers the sum of 70¢ per ton for each ton of grit and gravel delivered.

3. I also understand that Mr. Moran testified that the independent truckers are now charging Pine Hill, and Pine Hill is allegedly paying, the increased price of 90¢ per ton for each ton of grit and gravel delivered to Frey.

4. Plaintiff has not yet had the opportunity to examine Pine Hill's books to determine its actual costs, but deponent is familiar with the practices of the industry and can unequivocally deny the accuracy of Mr. Moran's testimony.

5. Independent truckers are used by Pine Hill for occasional trucking assignments when any one of a number of scattered customers may require one or a small number of gravel deliveries. For any extended number of deliveries or any long-term trucking, Pine Hill does not use independent truckers but rather its own trucks and employees.

6. Deponent observed that the truck which Pine Hill uses to deliver gravel to Frey is a 1969 Ford, 14-yard (18 ton capacity) which bears New York State commercial registration number 8955GS. Deponent has been informed that Mr. Moran in his testimony on October 16 denied that Pine Hill owned this truck. However, a check with the Motor Vehicle Bureau in

Albany through the Police Department computer reveals that the truck in question is owned by Quadco Hauling Corporation with offices at 2255 Bailey Avenue, Buffalo, New York. Quadco's offices thus are apparently in Pine Hill's office which is also at number 2255 Bailey Avenue.

7. The City Directory listed Quadco Hauling Corporation's officers as Carl E. Kahle, President, and Curt G. Kahle, Vice President. Carl E. Kahle is Vice President of Pine Hill, and Curt G. Kahle is Secretary of Pine Hill, and deponent believes that ine Hill, or its principals, are the shareholders of Quadco Hauling Corporation.

8. Deponent has been unable to find any telephone directory listing or telephone for Quadco Hauling Corporation; and believes that Quadco uses Pine Hill's telephone facilities.

9. The driver of the truck who is now delivering grit and gravel from Pine Hill to Frey's bins is Walter S. Hawro who resides at 200 St.Mary's Street, Lancaster, New York. Mr. Hawro is listed in the City Directory as an employee of Quadco Hauling Corporation.

10. Deponent has been informed that Pine Hill does employ independent truckers but not for delivering grit or gravel to Frey or for similar type operations which are on a constant day-to-day or long-term basis.

11. Pine Hill, like everyone else in the business, uses independent truckers for occasional retail deliveries of grit and gravel. These retail deliveries are of a more sporadic nature and are to different retail customers at different locations and at more or less indefinite times. It would be financially impossible to hire independent truckers at either 70¢ a ton or 90¢ a ton to deliver grit and gravel on a wholesale basis since the trucking would constitute the major cost element of the material.

12. For example: In August, 1971 when Pine Hill resumed delivering, Frey purchased on the average approximately 570 tons of grit and gravel per day from Pine Hill. An independent trucker supposedly would have charged 70¢ per ton or $399.00 per day for delivering this material.

13. The same material could be delivered in 4 1/2 hours (at the rate of 7 trips per hour times 18 tons per trip). In 1971, the cost of hiring a truck or driver was approximately $13.00 per hour, including all expenses, or a total of $58.50 per day to deliver 570 tons of grit and gravel.

14. Pine Hill has charged Frey $399.00 for delivering 570 tons of material, thus making a delivery profit of $340.50 per day on trucking alone. This is one of the reasons why Frey has been unable to compete with Pine Hill.

15. Pine Hill's conduct is more aggravated when it is considered that Mr. Moran, as deponent has been informed, would not tell the Court whether or not Pine Hill actually paid 70¢ per ton to independent truckers. Mr. Moran would only keep reiterating that independent truckers charge 70¢ per ton.

16. However, the fact is that Pine Hill was not charged 70¢ per ton; Pine Hill did not pay 70¢ per ton; and Pine Hill did not use independent truckers.

17. The fact is Pine Hill delivered the grit and gravel to Frey in 1971 with its own employee, viz: Warren Cummings. Mr. Cummings' wages, including fringe benefits, in 1971 were approximately $6.90 per hour, and the cost of renting a truck was approximately $5.00 an hour making the total of $11.90 an hour. Since Mr. Cummings worked for five hours in delivering the material, Pine Hill expended only a total of $59.50 in delivering the 570 tons of material and charged Frey $399.00. Pine Hill, therefore, realized a profit of $339.50 on delivery based on the wages which it actually paid Mr. Cummings.

18. At the present time Pine Hill is only supplying Frey with gravel because the grit from which Pine Hill was selling Frey was defective, dirty and had excessive moisture. After June 1971, Pine Hill was supplying grit and gravel to Frey from the Peppermint-Pavement Road washing plant which Frey

formerly owned. After Frey refused to buy the defective grit in 1972, Pine Hill stopped supplying Frey from the Peppermint-Pavement Road plant and delivered gravel from its other plants in the vicinity.

19. The fact is Pine Hill delivered the materials to Frey using the truck of a subsidiary, namely: Quadco Hauling Corporation, and one of its own employees Walter S. Hawro. This is the situation which prevails at the present time. Thus, at present Pine Hill delivers gravel to Frey by using an over-the-road truck which picks up the gravel at Pavement Road and Nichter Road, approximately 1.6 miles from the Frey bins.

20. Pine Hill still uses Mr. Hawro and its Quadco Hauling trucks to deliver the gravel and the only difference is that now it takes the truck a little longer so that it can now safely make 4 trips per hour or deliver 72 tons per hour.

21. Pine Hill is requesting the Court to increase the trucking price to 90¢ per ton which would for 72 tons mean a price of $64.80 per hour which Frey would have to pay for the gravel. However, this only costs Pine Hill $10.00 per hour for Mr. Hawro's wages and $6.00 per hour for fair truck rental, or a total of $16.00 making a profit of $48.80 per hour, or over 67.8¢ per ton profit on delivery. If Pine Hill were to use an independent trucker with his own truck, its actual cost would only be $17.00 per hour on this type haul, or a profit of $47.80 per hour.

22. Even this charge is excessive because the driver does not deadhead back but has a return trip for Pine Hill most of the time. The driver usually takes a load of

bank run materials from Pine Hill's pit at Peppermint-Pavement Road or from Jones Road, and brings it back to the washing plant where he dumps it and picks up another load for Frey. Deponent submits that this should cut Pine Hill's expense of delivering to Frey by two-thirds since when you consider times and distances Mr. Hawro is spending the greater part of each hour delivering materials to the Pine Hill plant rather than to the Frey plant.

23. For example: on October 17, 1974 I observed Mr. Hawro delivering gravel to Frey's batching plant on Peppermint and Pavement Road; from there Mr. Hawro went to Jones Road approximately four miles to the northeast where he picked up a load of bank run material at Pine Hill's Jones Road pit; Mr. Hawro then trucked this bank run past Frey's old washer plant to Pine Hill's Pavement Road-Nichter Road plant (approximately six miles), where he dumped the bank run material; Mr.Hawro then worked with his truck at Pine Hill's Pavement Road-Nichter Road plant and spent some time moving several loads of stone from the washing plant on that premises to Pine Hill's stockpile; and finally Mr. Hawro then filled up with a load of gravel for Frey and proceeded to deliver it, again repeating the cycle.

24. Deponent estimates Mr. Hawro spent only about 25% of his time hauling stone for Frey and the remainder of the time was spent hauling materials for Pine Hill.

Opposing Affidavit of Herbert G. Frey.

24A. It is important to understand why our contract with Pfohl provided that Pfohl would deliver the material into our bins without any trucking charge. The reason for this was that it was and is more economical for Pfohl and Pine Hill to deliver the gravel to our batching plant than it was or is for them to truck it to their stock piles. It should be noted that gravel is usually sold and loaded by crane or high lift at the stock pile location rather than at the washing plant location where it is quite wet and usually not as desirable for sale.

24B. Pfohl had to utilize a driver and dump truck to remove the material from our Peppermint-Pavement Road washing plant in order to properly operate the plant and maintain his stock piles. These stock piles were farther from the washing plant than our bins and it took half the time for the truck to go to our bins than it did to go all the way over to the stock piles which Pfohl and Pine Hill maintained. Because of this, Pfohl and Pine Hill actually saved money by delivering the material to the Frey bins rather than driving the material all the way over to the stock piles. The washing plant, our batching plant and the stock piles are all on the same premises and the movement of gravel from the washing plant is really an internal manufacturing operation rather than a trucking operation. (See annexed photograph)

Dotted Line .....
Represents Typical
Pine Hill Truck Path.
Round Trip is 2600'
and Takes 7 minutes,
or 8 to 9 Trips/hour
Pine Hill
Stock Piles
Pine Hill
Scale House
Pine Hill
Washing Plant
PLANTS ARE
200 FEET
APART
FREY
CONCRETE PLANT
FREY'S BINS
FREY
MIXER
TRUCK
Pine Hill
Stock Piles
PINE HILL
LOADING CRANE

24C. It only takes Pine Hill's driver 7 minutes to make a round trip with a full load of gravel from the washing p lant to Frey's bins and back to the washing plant, and the driver can make 9 trips an hour or up to 75 round trips a day between the washing plant and our bins. The driver could not make nearly that many trips if Frey was not purchasing the gravel and the driver had to drive all the way over to the stock piles. Thus, Pfohl and Pine Hill's trucking expense is actually cheaper than trucking to Frey's bins than to the Pine Hill stock piles where the material is normally trucked for sale to customers.

24D. More recently Pine Hill changed its method of operation so that it only needed to use a truck for part of its stock piling. Nevertheless, Pine Hill still has to use trucks to transport the material from the washing plant to the more distant stock piles and filling Frey's bins from the Peppermint-Pavement washing plant does not constitute a trucking expense but rather an internal plant movement.

24E. Pine Hill's grit, which we have not purchased since 1972, is defective because Pine Hill did not modernize our former washing plant at Peppermint-Pavement Roads. Pfohl had purchased the Eagle Sand washing modification equipment which would have guaranteed us an adequate supply of good grit

from this plant. When Pine Hill purchased Pfohl in 1957, they sold the modification equipment and have never modernized the plant.

24F. The discriminatory nature of this conduct can be best understood when it is realized that our plant at Peppermint-Pavement Roads was the nearest washing plant that Pine Hill owned at the time when it started modernizing its plants. However, it modernized its other and older plants but did not modernize the newer plant next to our batching plant.

24G. Pine Hill's conduct was even economically unjustified because our former plant at Peppermint-Pavement Roads was the closest plant to Pine Hill's gravel pits and to its own concrete batching plant. By modernizing its other gravel plants, Pine Hill lengthened by over 3 miles the truck run from its gravel pits to the washing plant and then back to its concrete plant. I question if this conduct has any other explanation than a desire to discriminate against Frey and the gravel washing plant next to our concrete plant.

25. I do not believe that Frey should be required to pay any delivery charge in escrow, as provided by this Court's order of June, 1971 since our contract with Pfohl (Pine Hill) requires that the material be delivered in our hoppers. This is one of the special considerations and conditions under which we agreed to sell our gravel plant to Pfohl -- and which it was thought would enable us to have an assured low cost gravel supply and remain competitive with Pine Hill.

26. Frey Concrete is presently operating at a substantial loss. We have lost $150,000.00 this year to date and expect that the loss for the entire year will be substantially greater. We are unable to meet Pine Hill's concrete prices as it is, and if Pine Hill's price of gravel is increased, or its delivery charge is continued, and much more if it is increased, we will be so much more unable to successfully compete. For example: Pine Hill has been steadily drawing away our customers by concerted effort and representations to our customers that it will assure them a price of $22.00 per yard of all wall concrete if they will purchase from Pine Hill. Our price as of April 1 was $23.70 per yard and the requested increases, together with the increases in cement and labor would require a further increase to $25.00 per yard.

27. I believe that Pine Hill, on the other hand, is purposely absorbing these increases and attempting to make us pay higher gravel prices and transportation prices in order to drive us out of business.

28. Buffalo Slag Company, a concrete supplier in this area, has already been forced to cease business.

29. Deponent has been informed that on the October 16 Hearing, the Court inquired as to whether or not Frey desired to buy gravel from Pine Hill. Most emphatically, we need to purchase gravel from Pine Hill at the terms set forth in the contract, as this contract affords us our only guarantee of a source of supply in the Buffalo area at a price reasonable enough to allow us to compete with Pine Hill. We sold our gravel plant to Pfohl who was in the sand and gravel business and not in the ready-mix business, and, therefore, not a competitor under this contractual arrangement so that we would have this assured and reasonably low-price local source of gravel. When Pine Hill purchased our washing plant from Pfohl, they commenced raising prices and engaging in a series of unfriendly acts which indicate to me an attempt to drive us out of business.

30. The reason why Pine Hill's conduct is so serious is that there is no other gravel available in the

County of Erie in close proximity to our plant. I have personally conducted a search for gravel throughout the entire County of Erie, and have been unable to find any commercial gravel deposits which are not owned by the defendants in this case. There are six gravel washing and screening plants in Erie County. Four of those are owned by Pine Hill (including our former plant at Peppermint-Pavement Road which we sold to Pfohl) and the fifth plant is owned by Clarence Sand and Gravel. The output of this fifth plant is not available for public sale but is used by Clarence Sand and Gravel in its own ready-mix business. Clarence Sand and Gravel is the third largest ready-mix company in Erie County, after Pine Hill and Frey, and uses almost its entire gravel output for its own ready-mix concrete business. The sixth plant is Dan Gernatt located 43 miles south of Lancaster, in the Town of Collins.

31. It, thus, appears to me that Pine Hill has a monopoly of all the available gravel washing and screening plants in Erie County and all of the available sources of commercially available gravel. Our only alternative gravel supplies is Gernatt's gravel washing plant at the south end of the County of Erie about 43 miles from our Lancaster plant, and the other plants which are at substantial distances outside of the County of Erie and involve a very large trucking expense which raises the total price of gravel to a point where we cannot meet Pine Hill's concrete prices and are continuing to lose customers.

32. The Pine Hill posted pit price is no indication of the fair market value of gravel in Buffalo. There is no demand for this gravel in commercial quantities, except by Pine

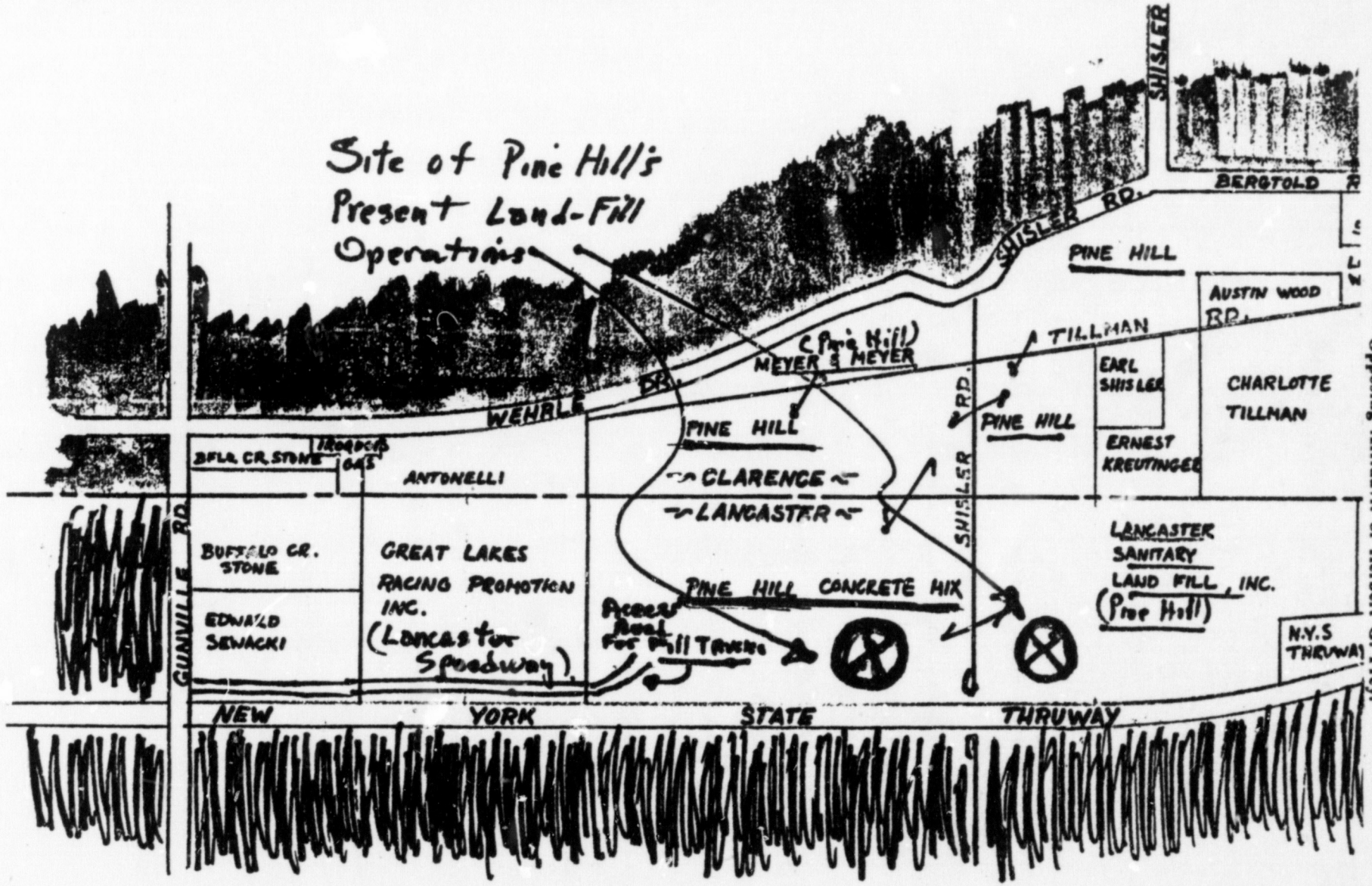
Hill and by Frey as Clarence Sand and Gravel has its own sources. Pine Hill goes through the self-serving gestures of charging its list price for the gravel which it sells to itself, but this admittedly is a paper transaction according to Mr. Moran. Actually, Pine Hill realizes a substantial profit on its "paper sales" of gravel to itself, and is actually paying a very low price for this gravel. To deponent's mind, the best indication of what the prevailing posted pit prices for gravel would be in this area, if Pine Hill did not own the gravel plants and gravel sources, is indicated by the prevailing pit prices in the surrounding counties which are not controlled by Pine Hill. The gravel prices have remained almost constant during the past four years, with even some decreases, and where there has been an increase, it has only been a few cents per ton. This should be contrasted with Pine Hill's unilateral increases of $1.00 a ton in 1968 on grit and 10¢ a ton on gravel. In 1974, they seek to reverse the non-linear increase. These non-linear gravel increases by Pine Hill indicate that Pine Hill is manipulating gravel prices with the object of improving its competitive advantage over Frey in the concrete business.

33. The only difference in the cost of producing gravel in the outlying counties and the cost of production by Pine Hill in Buffalo is the increased labor expense in Buffalo and the increased land expense.

34. Based on my experience in the sand and gravel business, and as President of Frey Sand and Gravel Corp., of Alexander, New York, the labor costs in Buffalo are approximately 50% higher than in the outlying areas. Labor hitorically constitutes not more than 40% of the net selling price of a ton of gravel. Accordingly, in order to adjust an outlying gravel price to a realistic Buffalo price, it would be justifiable to add a 20% premium to the outlying price. Thus, if gravel were selling for $1.20 a ton in Franklinville, the adjusted Buffalo price would be $1.44 per ton.

35. The cost of acquiring and ownership of land, including taxes, is concededly greater in Buffalo than in Franklinville. However, Pine Hill is utilizing its excavated gravel lands for garbage filling operations for which it actually receives many times more profit than for the material it excavates (See annexed map). Therefore, Pine Hill actually is entitled to no premium for the higher land expense or taxes in this area. In fact, it is apparent that Pine Hill is using its landfilling operations to finance its low prices of concrete which it has maintained even in the face of the "double digit inflation" figures which its counsel cites to this Court.

36. I ask the Court, how Pine Hill has been able to maintain a price of $22.00 per yard of wall mix concrete since 1971, and how it can take away our customers today with the assurance that it will continue a $22.00 price as against



Opposing Affidavit of Herbert G. Frey.

our $23.70 price on which we are losing money but for Pine Hill's use of the landfill operation to subsidize this policy which is driving us out of business?

37. Even if the Court were to ignore the landfilling operations, Pine Hill would not be entitled to more than a 5% addition for the higher land costs and real estate taxes in the Buffalo area and that would mean a total of a 25% adjustment. Thus, the fair price in Buffalo of a ton of gravel, if Pine Hill did not have a monopoly would be approximately the $1.20 Franklinville price, plus 25%, or $1.50 per ton F.O.B. the Buffalo washing plant. The present Pine Hill price for number 1 gravel after affording Frey the 20% plus 2% discount is $2.35 which under the contract should also be the delivered price (but the Court ordered an additional 70¢ per ton for delivery to be held in escrow). Since the contract requires delivery, 70¢ should really be DEDUCTED from the $2.35 which would yield a price of $1.65 as the Pine Hill price of gravel, F.O.B. its washing plant. The accuracy of my computation is apparent since I computed a free market Buffalo price of gravel, F.O.B. washing plant, of $1.50 a ton.

38. It thus appears that Pine Hill should receive no price increase in gravel since Franklinville and the other outlying plants are still charging $1.20 per ton; the fair adjustment to this price to a competitive Buffalo market price

yields a price of $1.50 per ton; and Pine Hill's present price after deducting 20% plus 2%, and after deducting 7%, for the delivery required by the contract, yields a price of $1.65 per ton.....which is quite comparable.

39. This is how well thought out the contractual provisions were when we gave up our gravel plant in return for an assured low cost source of gravel from Pfohl Brothers. When Pine Hill illegally purchased the plant from Pfohl, our existence was threatened and now Pine Hill's activities in manipulating gravel prices and deliberately selling concrete at below-cost prices, which we cannot meet, is about to drive us out of business.

40. Presently, we are operating at a loss for this year of approximately $150,000.00 for the first nine months of this calendar year and we are still continuing to operate at a loss during this last quarter. Any price increase to Pine Hill will increase our losses and at the same time give us a double whammy by increasing their income and allowing them to continue to decrease their concrete prices.

41. If one more example be needed of Pine Hill's efforts to corner the gravel supply and injure us, it is apparent from its activities in Alexander, New York.

There our gravel company, Frey Sand and Gravel Corp., has a small gravel operation. Since the gravel bank on our land in Alexander is of limited size, we sought to purchase additional land on the east which is a continuation of the same bank of gravel. While we were negotiating to purchase this, the owners informed us that they had sold this bank adjoining our land to the defendants in this case. Thus, Pine Hill cut off one of our gravel supplies at our own gravel plant.

42. The most revealing aspect of Pine Hill's predatory conduct is the fact that Pine Hill bought this land at Alexander even though it cannot be used by Pine Hill since they do not have access to it by trucks or equipment. The land stands idle with defendants unable to use it, and apparently being held by them merely to prevent us from using it. We can use it and they can't, but they purchased it so as to deprive us from using it.

43. One of the reasons that we stopped purchasing grit from Pine Hill was the excessive moisture content. All grit has some inherent moisture of which there is a maximum customary tolerance of 4% to 5%. However, the grit which Pine Hill delivered to us was so wet that it was almost sloppy in consistency, and jammed our bins. We tested this grit for moisture content and found that samples ran as high as 12 1/2% moisture and many times averaged as high as 10%. This meant that many times the excessive moisture was about 5% and resulted in our paying an additional 5% premium for grit.

43A. In order to eliminate this moisture, the Peppermint-Pavement Road plant which Pine Hill used to supply this grit needs to be updated by the addition of certain machinery which costs approximately $50,000.00. Pfohl Brothers had this equipment on hand for installation when Pine Hill purchased our plant from Pfohl. Pine Hill did not install this equipment but sold it. At the same time, it should be remembered that Pine Hill has made this updating improvement on three of its own plants which it uses to supply its own needs of concrete grit.

44. With respect to Pine Hill's request for a price increase, I wish to call to the Court's attention that grit and gravel prices have either remained constant or have experienced only slight increases during the past four years. In some cases, there has even been a decrease in grit and gravel prices.

45. In our testimony before the Court on October 16, my sister Lois Muck submitted an exhibit, which was marked "Exhibit 1 in evidence", which listed posted pit prices and net prices for grit and gravel from Pine Hill and other pits from which we have purchased.

46. In addition, I wish to submit the Batavia Gravel Company as a further example. Between 1970 and 1974, the Batavia Gravel Company did not increase the price of either

Number 1 or Number 2 gravel and did not increase the price of concrete grit, except for a 15¢ increase in grit alone, this year.

47. I submit that if the cost of producing gravel has increased, the other companies in this area would have experienced these increases and the increases would have been reflected in their prices. I, therefore, believe that Pine Hill has either not sustained any increased cost of producing gravel, or if it has had any price increases, it is absorbing them and maintaining a fixed concrete price while at the same time seeking to utilize this Court to force us to pay a higher gravel price and, therefore, be forced to raise our c oncrete price to become even more non-competitive with respect to Pine Hill.

48. I request the Court to reconsider its June 9, 1971 order and reconstitute the price structure in an equitable and realistic manner, pending the outcome, so that Frey can survive and continue to compete.

49. Unless Frey is granted some relief in the form of reduced prices and elimination of the delivery charge, I do not know how we can continue to lose money and survive in the face of Pine Hill's deliberate price cutting activities.

Opposing Affidavit of Herbert G. Frey.

50. Pine Hill's representatives, including their controller and their attorney, have spent many days looking at our most confidential internal financial and accounting records. They have looked at our income tax returns, our purchase and expense records, material cost records, our sales records and all of our other records pertaining to expenses, profit, loss, customers, property holdings (personal as well as corporate) contracts, options, etc. They have had full access to all of the records which we consider to be trade secrets and confidential pricing and cost information.

51. Both my sister and I have observed that since Pine Hill has obtained access to this information and examined our books, they have competed with us more successfully and more savagely. It appears to me that they are using these trade secrets and our confidential financial data full force against us in an all-out attempt to drive us out of the market. They have deliberately continued to maintain a 1971 price for concrete, which we cannot meet, despite "double digit inflationary" increases which they are claiming in this Court as the reason for increasing the gravel price. We have lost many customers who we had on the books at the time when they examined our books.

52. My sister, Lois Muck, and I believe that Pine Hill's so-called 1974 posted pit prices were designed exclusively for us and directed at us as their largest customer which consumes most of their gravel. We believe that their application to this Court to increase the price is an attempt to have this Court innocently implement their plans to drive us out of the market. We cannot continue to operate in the present loss situation and need extraordinary relief to contend with the aggressive and savage competition which Pine Hill is presently conducting.

53. For these reasons, I object to Pine Hill's application for an increase in trucking or delivery expense and object to Pine Hill's charge of even 70¢ per ton, and request that the Court's order of June 9, 1971 be amended to return to the May 7, 1971 order, or to adopt our proposed alternatives.

Herbert G. Frey

Herbert G. Frey

Sworn to before me this
24th day of October, 1974.

F. TERRY SZYMCZYK
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1976

Plaintiffs' Statement in Support of Proposed Modifications.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PA[illegible]. M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the ass[illegible]s of PFOHL BROTHERS, INC., a d[illegible]ssolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

CIVIL NO. 1970-277

PL[illegible]INTIFFS' PROPOSED MOD[illegible]CATIONS TO ORDER OF JUNE 9, 1971.

Plaintiffs submit that the interim order of this Court granted June 9, 1971 was erroneous and severely prejudiced plaintiffs, and plaintiffs are continuing to suffer irreparable harm because of the unfair provisions contained thereof.

Plaintiffs submit that the order of June 9, 1971 was intended to be a temporary and interim order to apply during a brief period of mutual depositions and discovery, as specifically delineated by the Court in the order of June 9, 1971.

Plaintiffs' Statement in Support of Proposed Modifications.

Plaintiffs submit that neither the Court nor the parties ever intended or considered that the order of June 9, 1971 would apply during the 3 1/2 years that have ensued. During this period plaintiffs have still to take their first deposition or to conduct any discovery of defendants' books and records. Without counting the application to this Court which resulted in the May 7, 1971 order which was modified by the June 9, 1971 order, plaintiffs have applied to this Court, and/or to Magistrate Edmund F. Maxwell, on numerous and repeated occasions, by the formal written motions, and by verbal requests in open Court for permission to proceed with their own discovery, and either to suspend defendants' discovery and depositions during that period, or at least to allow the parties to conduct their discovery and depositions at the same time as contemplated by Rule 26(d) of the Federal Rules of Civil Procedure.

At no time did plaintiffs submit that at no time has this Court made any Findings of Face or Conclusions of Law as required by, or to comply with, Rule 26(d) of the Federal Rules of Civil Procedure, namely, "Methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery", *** "Unless the Court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise". (FRCP 26[d]).

Plaintiffs' Statement in Support of Proposed Modifications.

The complaint in this case was filed on Juny 17, 1970, over 4 1/2 years ago, and plaintiff has had its books and records, including its most confidential business costs, expenses and losses available to the defendants in this case for a long period of time, during which time defendants have been cutting their prices to a point which plaintiffs can no longer meet. This is before the proposed increase in gravel expenses, which will directly affect and cause an increase in material costs, and an increase in the out-of-pocket costs of plaintiffs' concrete of approximately 55¢.

Defendants have been adhering to a $22.00 per yard price for wall concrete, for example, since 1971, and are continuing to adhere to the $22.00 price and to represent to plaintiffs' customers that if they will leave plaintiffs and do business with Pine Hill, that they will continue to receive the $22.00 price for the indefinite future.

Plaintiffs, on the other hand, were forced because of the labor increases and other expenses which defendants are also subject to, to raise their price for this concrete on April 1, 1974 from $22.00 a yard to $23.70. If the present increase is granted, the plaintiffs will be required to raise their price to $24.25 per yard and will be further unable to compete. Defendants admitted in Court that they charged themselves the same price for gravel and trucking that they charge plaintiffs. In addition, defendants have

been subjected to increased labor costs and multiple increased cement costs and, as defendants put it, "double digit inflation" which raised the prices of all of the elements which go into their concrete, and yet defendants continue to maintain a $2..00 per yard price for wall concrete and seek an increase which will cause plaintiffs to raise their price to $24.25. In addition, the labor increase of July 1, 1974, and the interim cement increases, should require plaintiffs to raise their concrete prices to $25.00 per yard. But these increases have not caused defendants, who have experienced these same increases, to move from the $22.00 per yard price.

The plaintiffs are presently losing money at the rate of $150,000.00 for the first nine months of this year, and the picture does not look any brighter for the last quarter of this year. Plaintiffs will not be able to continue in business under the present arrangement. If the situation continues, plaintiffs will have to decide what steps will have to be taken in order to close its doors so that it will not hurt any of its creditors. Plaintiffs will then be left only with a remedy of an antitrust action in this Court which they intend to pursue to the fullest extent possible.

Defendants are clearly violating the antitrust laws by:

A. Unfairly competing (clear antitrust violation);

B. Acquiring plaintiffs' gravel plant (a per se violation of Sherman Act §§ 1 and 2, and Clayton Act § 7);

C. Using this Court as a weapon to force plaintiffs to raise their concrete prices while they, the defendants, are keeping their prices at a loss level (a clear case of duplicituous use of the antitrust laws);

D. Using this bait of "below cost prices" to induce plaintiffs' customers to leave and do business with defendants (clear case of multiple antitrust violation);

E. Giving discounts, rebates and/or free dirt or fill to potential customers on condition that they do business with Pine Hill (a clear Clayton Act, § 3 violation);

F. Subsidizing Pine Hill's losses from below-cost concrete sales by use of profits from the landfilling and garbage dumping operations of Pine Hill itself, and its subsidiary Lancaster Sanitary Landfill, Inc.

from the charges it makes for garbage dumping in the excavation from which it takes its gravel (a clear antitrust violation);

G. An "overkill" monopoly of 100% of the known commercially available gravel deposits and all of the gravel washing plants in the Buffalo area (each a violation of § 2 of the Sherman Act);

H. Embarking on a course of acquiring the concrete plants of competitors in the Western New York area, and purchasing the customers of one of said competitors, namely: Queen City Ready-Mixed Company (a multiple violation of §§ 1 and 2 of the Sherman Act, and § 7 of the Clayton Act); and

I. Generally engaging in a course of unfair competition and predatory acts, including in the method of their aggressive and dilatory defense of this litigation, and in breaching the Agreement of May 17, 1949, and otherwise using their efforts to drive plaintiffs out of business.

Plaintiffs' Statement in Support of Proposed Modifications.

Plaintiffs submit that by their discovery of plaintiffs' books, records, costing and pricing information, defendants have utilized such information and their knowledge of plaintiffs weakened financial condition (caused by defendants' predatory acts) to their own advantage and to plaintiffs' detriment and further disadvantage and injury.

Defendants have apparently formed a strategy and have been able to deceive the Court as to the justness thereof, which had as its purpose the search and use of all of plaintiffs' business and financial data and the use of the same to attack the plaintiffs in any financially vulnerable positions, and all the while artfully denying and delaying plaintiffs in conducting discovery or depositions of defendants or their books.

Plaintiffs submit that this action having been commenced on June 17, 1970, and being 4 1/2 years old, that to their knowledge there is no other action on the docket of this Court that a plaintiff desiring to take depositions and have discovery has been consistently denied its repeated requests so to do and has been deprived of its legal rights to depose and discover either in sequence or simultaneously. Plaintiffs submit that the Court has made no findings required by Rule 26(d) of the Federal Rules of Civil Procedure, and that

there is no basis for any rule in that the convenience of the witnesses and the interests of justice would not be served, subserved thereby, and in fact, are being thwarted thereby.

Plaintiffs, thus, submit that this Court has been deceived by defendants and lulled into a clear violation of the mandate of Rule 25(d) and that plaintiffs should be entitled to pre-emptory and mandatory relief, and without being required to suffer the ordeal of a trial as a disadvantaged litigant and having to appeal a possibly adverse outcome of an academic case after they are forced out of business by defendants' strategy.

Under the foregoing circumstances, not even the most compelling proof of increased expenses on the part of the defendants would justify increasing the prices set forth in this Court's order of June 9, 1971. However, defendants offered no proof on the subject. They called no witnesses, and offered no exhibits, but merely rested on their affidavits.

Plaintiffs promptly moved to deny and/or dismiss their application. The Court denied plaintiffs' motion. Plaintiffs submit that this was error. Plaintiffs further submit that the burden was on defendants to justify any increased price, and a fortiori where defendants have been cutting the price of concrete in the face of the increased costs they are alleging.

Plaintiffs' Statement in Support of Proposed Modifications.

REQUEST FOR FURTHER HEARING

Plaintiffs request a further hearing before this Court and an opportunity to present the proof which was the subject of plaintiffs' various offers of proof made on October 16, 1974 which were denied by the Court, as well as an opportunity to present additional evidence to demonstrate defendants' bad faith, the lack of basis for defendants' present application for increased prices, defendants' non-competitive and predatory conduct and its attempt to utilize this Court in the service of its improper objectives, and the weakened financial condition and threatened existence of plaintiffs which has been caused thereby, and the inability of plaintiffs to continue to survive under the order of June 9, 1971, or any amendment which would continue the same or increase the prices contained therein.

Dated: Buffalo, New York

October 25, 1974.

Respectfully submitted

RAICHLE, HANNING, WEISS & HALPERN

By _____

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Plaintiffs' Response to Defendants' Suggested Amendments to the Order of June 9, 1971.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

CIVIL NO. 1970-277

PLAINTIFFS' RESPONSE TO DEFENDANTS' SUGGESTED AMENDMENTS TO THE ORDER OF JUNE 9, 1971.

Plaintiffs herewith responde to defendants' proposal dated October 28, 1974 proposing amendments to the order of this Court dated June 9, 1971.

Plaintiffs ACCEPT the amendments proposed by defendants, SUBJECT to the following conditions, modifications and comments, all without prejudice to their contentions in the litigation, with the actual rights of the parties to abide the event, and to be finally determined by the outcome of the litigation:

¶ 2, page 12 OF PINE HILL'S PROPOSAL:

Pine Hill proposes to sell Frey all of Frey's requirements, of grit and gravel for Frey's

Plaintiffs' Response to Defendants' Suggested Amendments to the Order of June 9, 1971.

Lancaster, New York batching plant, at the old prevailing prices and without the requested increase, less the agreed 20% and 2%, but F.O.B. Pine Hill's plants.

COMMENT

A. Frey desires to purchase all of its requirements of concrete, sand and gravel, which defendants are agreeing to sell at these old prices, namely, $3.50 per ton for grit, and $3.00 and $2.75 per ton for number 1 and 2 gravel.

B. Frey is agreeable to the discount proposed by Pine Hill, namely, 20% and 2%, because those are the discounts required by the contract between the parties; but Frey desires to call to the Court's attention that Frey is admittedly Pine Hill's largest customer, and all other gravel pits grant much larger discounts to quantity purchasers and in addition, their list price is much lower than Pine Hill's.

C. Frey agrees that pending the litigation, it will purchase the gravel

F.O.B. Pine Hill's plant and will itself deliver the material. However, the contract clearly requires Pine Hill to deliver the material. Since Pine Hill's claims that this material is being delivered by "independent truckers" and that it actually costs Pine Hill "90¢ per ton" to deliver it, Pine Hill should be required to place in escrow the sum of 90¢ per ton to insure Frey that if it prevails in the litigation, the delivery expense, which should have been paid by Pine Hill, and will now e assumed by Frey, will be secure and available to Frey for refund.

D. Pending the outcome of this litigation, there shall be no price increases unless Pine Hill follows the procedures set forth in the contract for negotiation of a mutually agreeable price adjustment, or, failing this, obtains a further order of this Court, on notice to plaintiffs.

¶ 4, page 13 OF PINE HILL'S PROPOSAL:

Pine Hill proposes that any disputes regarding the quality or quantities of materials provided by Pine Hill shall be heard

and determined by the United States Magistrate upon written notice.

COMMENT

A. Frey is agreeable that all disputes be heard by the Magistrate, provided that the Magistrate and the parties observe the following standards and conditions:

1. All materials must comply with ASTM specifications, and must not contain friable material, adverse amounts of alfalfa roots, wood, lumps of clay or clay-coated stone.

2. Moisture content must not exceed 5%.

3. All material must originate from Pine Hill's Pavement-Nichter Road plant (from which plant Mr. Norman Moran testified on October 16, 1974, that Pine Hill would be agreeable to supply Frey's requirements) unless and until such time as Pine Hill updates the Peppermint-Pavement Road washing plant to the extent that it has modernized the

Pavement-Nichter Road plant so as to produce materials of equal or better quality.

4. In the event that Frey in good faith is of the opinion that either the grit or any of the gravel is not in conformance with said specifications or the requirements thereof, and Pine Hill does not correct the situation immediately after verbal notice, Frey may immediately obtain all or part of its requirements from any other source until corrected to satisfy Frey's needs. However, if problem can not be resolved in a short time, (say one to three weeks) and is an apparent prolonged problem, then the dispute should be submitted to the Magistrate for his determination thereon.

5. In the event that grit and/or gravel "approved" by the Magistrate will still not produce commercially acceptable or competitive concrete, Frey shall have the right to purchase its requirements of the defective materials from such other sources as are available, and with Pine Hill to have the right to apply to the Court for any price adjustments, if any, which it may consider

proper under the circumstances.

6. No party shall waive any rights by reason of defective materials herein by reason of any action taken under this paragraph or any interim decision by the Magistrate with regard to any dispute hereunder, but the entire matter shall abide the event of this litigation.

¶ 5, pages 13-14 OF PINE HILL'S PROPOSAL:

Pine Hill NOW proposes Frey should ADDITIONALLY pay into the escrow account the 20% discount, provided for by the contract, or post a surety bond therefor.

COMMENT

A. The contract requires Pine Hill to accord Frey a 20% volume discount. There is no reason why Frey should be prejudiced by paying the 20% discount into escrow when there is no showing that it is not entitled to this discount, and there is a showing that it is Pine Hill's largest customer, and that all large customers are accorded much larger discounts by other gravel pits, and that these

discounts are even more significant because the other quarries charge lesser prices to begin with.

B. Pine Hill is obtaining its own quantity discount, in effect, as its own supplier for this gravel, and, therefore, the profit which it makes on its own gravel (as well as the profit it makes on Frey's gravel) is a discount which it obtains and uses in order to compete with Frey. (Moran's testimony of 10/16/74).

C. Requiring Frey to place the 20% discount in escrow (it would average about 65¢ per ton) would penalize Frey which is already in a poor cash position because of Pine Hill's anti-competitive activity. It would make Frey much less able to meet Pine Hill's presently <u>below-cost</u> sales prices of $22.00 per yard for 4 1/2 bag wall mix concrete.

D. The Court could best allow the parties to compete on an equal basis, as their contracts provided, if the order provided that Pine Hill was to sell Frey at a 20% plus 2% discount, and

that Pine Hill was either to deliver the material to Frey without charge and Frey place the delivery charge in escrow as is now done; or allow Frey to pick it up, and with Pine Hill to put the 90¢ per ton delivery charge, which it would thereby save, into the escrow.

E. Pine Hill is attempting to put the other shoe on the wrong foot by asking the Court to have Frey place the discount and the delivery charge in escrow -- the contract requires Pine Hill to give Frey the benefit of the discount and the free delivery, in consideration of the quantities involved and the taking over of Frey's gravel plant. If Pine Hill objects to complying with the contract and refuses to deliver, then Pine Hill should put in escrow the 90¢ per ton which it claims it pays to independent truckers and allow Frey to itself pick up the material.

F. Similarly, the 20% discount is provided by the contract and should not be placed in escrow by Frey. Actually, equitably interpreting the situation, the

contract should be used to preserve the status quo by requiring Pine Hill to place in escrow all selling prices in excess of those provided in the contract, namely, Pine Hill should sell Frey at the 1967 prices less the discount, and all claimed price increases should be placed in escrow pending the outcome.

G. If Frey were required to place in escrow the 20% discount, or an average of 65¢ per ton of grit and gravel, this would amount to approximately $1.00 per yard of its concrete selling price which would have to be placed in escrow.

H. If Frey were required to place in escrow 90¢ per ton for delivery, this would amount to approximately $1.75 per yard of concrete, or a total with the discount of $2.75 per yard of concrete.

I. Pine Hill is presently maintaining its below-cost concrete prices of $22.00 per yard for a 4 1/2 bag mix in order to drive Frey out of the business because it knows that Frey cannot meet this price at present. At present, Frey's price is $23.70 for this and Frey is losing money at this price.

Requiring Frey to take $2.75 off of its selling price and place this in escrow would put it even in a greater competitive disadvantage to Pine Hill and would further accomplish Pine Hill's objectives, albeit by the use of a Federal Court.

K. Since the contract requires Pine Hill sell at a discount, and requires Pine Hill to deliver, the only question should be with regard to price increases, namely: whether or not they were justified and the only conceivable logical approach to maintaining an equitable status quo is to require Pine Hill to sell at the last mutually negotiated price as provided in the agreement. Any increased price beyond that should be placed in escrow.

L. In this connection, if Pine Hill believes it is entitled to a price increase, it should implement the negotiating machinery provided in the contract for the increase of prices. These negotiations could well be held before the Magistrate to insure that the parties are negotiating fairly and in the event they could not reach an agreement to

ropose a new price, subject to review by the Court, and to abide the event of the litigation. By this method, the contract could be mandated without prejudicing any party.

M. Requiring Frey to put any monies in escrow for delivery or for discount is punishing the victim and rewarding the aggressor. It is Pine Hill which is seeking to break the contract, and it should not be rewarded by having Frey pay for Pine Hill*s adventure.

¶ 6, pages 14-15 OF PINE HILL'S PROPOSAL:

Pine Hill proposes that Frey shall receive no discount if it does not purchase its entire requirements from Pine Hill

COMMENT

A. If Frey does not purchase its entire requirements from Pine Hill because of Pine Hill's failure to meet the quality, moisture and other requirements for acceptable products, Frey should not be penalized by being denied a discount.

B. If for any justifiable reason Frey is required to purchase some of its requirements elsewhere, such as by customer specification of special

aggregate, Frey should not be penalized by losing its discount.

C. If Frey purchases only in very small quantities, like Pine Hill's other customers, then Frey agrees it is not entitled to a quantity discount.

D. If Frey purchases from Pine Hill regardless of any contract, Frey believes it is entitled to the quantity discounts which are usually accorded in the trade by Pine Hill and others.

¶ 7, page 15 OF PINE HILL'S PROPOSAL:

Pine Hill requests that Frey pay the sum of $8,160.52 to Pine Hill representing the price increase between April 1, 1974 and October 25, 1974.

COMMENT

A. Pine Hill in this order proposes to sell Frey at the old prices and yet under this paragraph requests Frey to pay for this year's gravel at the proposed new prices which it has already waived.

¶ 8, page 15 OF PINE HILL'S PROPOSAL:

Pine Hill proposes that the prices to Frey be based on "Pine Hill's current prices offered to others" and that the

prices be modified on application of either party.

COMMENT

A. The contract provides adequate machinery for adjusting prices which are necessary to reflect necessary changes. This has been covered already in a previous comment where it was noted that the parties upon their inability to agree, could refer to the Magistrate, who could find a fair and equitable negotiated price from time to time.

B. In any event, any Hearing on price changes should be based upon accounting evidence and not upon general statements of inflationary increases such as Pine Hill has submitted by affidavit in this application. The validity of this requirement is demonstrated by the fact that other producers have either maintained their prices during the past three or four years and in some cases have reduced them. Pine Hill obviously has not suffered any increased expenses because it is reducing and retaining its prices of concrete of which the gravel is a substantial component.

Plaintiffs' Response to Defendants' Suggested Amendments to the Order of June 9, 1971.

¶ 9, page 15 OF PINE HILL'S PROPOSAL:

Plaintiffs have heretofore appealed from the order of the United States Magistrate, dated October 22, 1974, concerning discovery and request that said order be reversed or modified as set forth in plaintiff's papers previously filed herein.

Dated: Buffalo, New York
November 4, 1974.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

TO: HON. JOHN T. CURTIN
United States District Judge
Western District of New York
United States Courthouse
Buffalo, New York 14202

VICTOR T. FUZAK, ESQ.
Attorney for Defendants
1800 M & T Plaza
Buffalo, New York 14203

Affidavit of Metro Ku

STATE OF NEW YORK:
ss
COUNTY OF ERIE

METRO KUSHMAN, being duly sworn, deposes and says:

1. I am a salesman for Frey Concrete, Inc., have been so engaged for approximately 8½ years.

2. I am familiar with the prices at which both Pine Hill and Frey Concrete are selling ready-mixed concrete.

3. I have read Mr. Norman Moran's affidavit dated October 29, 1974 and particularly noted paragraph 4 which mentions my name.

4. I emphatically deny the statements involving me, which are mentioned at the top of page 4 of Mr. Moran's affidavit. I did not approach the Pine Hill customers and I did not offer to sell concrete at $21.00 per yard. What actually happened is as follows.

5. Last week, Mr. Sal Tata, a concrete user, telephoned me and asked me to come to see him about the Erie Basin Marine Project. Mr. Tata said: "I understand I can buy concrete from Frey for this job for $21.00 per yard. Is that correct?"

6. I told Mr. Tata that this job required a 5 1/2 bag "city base" mi nd a 6 bag mix for the sidewalks. I told Mr. Tata there was "no way" Frey could sell him concrete for this job for under $24.25 per yard."

7. Mr. Tata replied: "I am buying it from Pine Hill for less than that", and there was no further conversation involving this subject.

Metro Kushman
Metro Kushman

Sworn to before me this
4th day of November, 1974.

Notary Public

Plaintiffs' Objections to Defendants' November 5, 1974 Retraction of Price Offer of October 28, 1974.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the ESTATE OF GEORGE C. FREY, deceased,
Plaintiffs,

-vs-

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,
Defendants.

CIVIL NO. 1970-277

PLAINTIFFS' OBJECTIONS TO DEFENDANTS' 11/5/74 RETRACTION OF PRICE OFFER OF 10/28/74.

1. Plaintiffs hereby oppose and reject defendants' letter dated November 5, 1974 by which defendants seek to retract the proposed prices set forth in their Suggested Order of amendment dated October 28, 1974. Defendants, by letter to the Court dated November 5, 1974, claim that the prices set forth on page 12 of defendants' "Memorandum and Suggested Order" dated October 28, 1974 are "in error" and request that the prices be amended upwards to the prices for which they are seeking interim approval in their application to this Court dated June 21, 1974.

Plaintiffs' Objections to Defendants' November 5, 1974 Retraction of Price Offer of October 28, 1974.

Plaintiffs cannot consent to the requested amendment, and are unable to accept defendants' claim of typographical error, for the following reasons:

A. Defendants' application dated June 21, 1974 was limited to a request for an increase in current list prices, allegedly justified because:

> "Pine Hill has a large supply of concrete sand (grit) and this is caused by Frey Concrete's refusal unjustifiably to buy our sand.
>
> ******
>
> "By its refusal to purchase grit, this has caused the large inventory and has been one of the factors in requiring the price increase for gravel." (¶¶ 5 and 9 of Affidavit of Robert E. Jones sworn to September 6, 1974).

B. However, this condition was eliminated because the prices proposed by Pine Hill in its October 28, 1974 modification proposal are specifically conditioned on:

> "*** whether Frey elects to purchase all of its requirements of concrete sand and all of its requirements of gravel for use in Frey's batcher (Ready-Mixed) Plant ***".

C. It thus appears that Pine Hill's application dated June 21, 1974 for price increase was based on Frey purchasing only

gravel from Pine Hill and purchasing its grit elsewhere; and that if Frey were then purchasing both grit and gravel from Pine Hill, Pine Hill never would have made its June 21, 1974 application for a price increase.

D. This appears to offer the only logical explanation for defendants' application dated June 21, 1974 for a price increase. It is consonant with the prices originally set forth in defendants' proposed modification order dated October 28, 1974, which was conditioned on plaintiffs thenceforth purchasing all of their grit and gravel from Pine Hill, and on thenceforth holding the 20% discount in escrow. These two conditions were not contained in defendants' original proposal dated June 21, 1974, [illegible] any of its submissions to the Court up until the proposed modification order of October 28, 1974.

E. It appears to plaintiffs that the price structure set forth in defendants' proposed modification order of October 28, 1974, (which proposal plaintiffs accepted, with certain clarifying conditions, by their "Acceptance" dated November 4, 1974) was based upon defendants receiving additional considerations from Frey than

originally contemplated and argued to the Court, namely, a tie-in of both grit and gravel purchases and the proposal that the discount be held in escrow. Although plaintiffs disagreed with this latter condition and contend that it is defendants who should hold the price increases in escrow; it is clear that defendants' October 28, 1974 proposal offered the proposed lower price structure in return for these additional proposed considerations which defendants wanted.

F. Plaintiffs accepted, with certain clarifications and conditions, defendants' proposed modification order of October 28, 1974, and then defendants made the claim of typographical error. Considering the importance of the litigation, and the perspicacity of defendants' counsel, and its comptroller, Mr. Moran, and considering these additional benefits sought by defendants at the time, plaintiffs cannot consent to defendants' request to amend the prices as erroneous.

2. For the foregoing reasons, it appears to plaintiffs to be more likely that defendants had second thoughts about their proposed modification order of October 28, 1974,

particularly when plaintiffs accepted it by their Acceptance dated November 4, 1974.

3. Unless the Court accepts this line of reasoning, it must accept the far more untenable assumptions that: defendants applied for a price increase on June 21, 1974 because plaintiffs were only buying gravel and not buying their grit from defendants; that defendants wanted to also sell grit to plaintiffs; and that defendants are still requesting the increased prices allegedly justified only when and because plaintiffs were not buying the grit from defendants.

4. For the foregoing reasons plaintiffs oppose, and reject, defendants' request to amend the prices set forth in defendants' proposed modification order dated October 28, 1974. Plaintiffs have no desire to take advantage of defendants or any typographical error, but plaintiffs are of the opinion that if there was any error, it was based on Pine Hill's misaprehension of the nature of its October 28, 1974 proposal and its surprise when it was accepted by Frey.

Dated: Buffalo, New York
November 13, 1974.

RAICHLE, BANNING, WEISS & HALPERN

By_____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

TO: VICTOR T. FUZAK, ESQ.
HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
Attorneys for Defendants
1800 One M & T Plaza
Buffalo, New York 14203

Affidavit of Lois Muck.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the ESTATE OF GEORGE C. FREY, Deceased,
Plaintiffs,

CIVIL NO. 1970-277

-vs-

AFFIDAVIT
OF
LOIS MUCK

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,
Defendants.

STATE OF NEW YORK:
ss
COUNTY OF E R I E:

LOIS MUCK, being duly sworn, deposes and says:

1. I am Treasurer of Frey Concrete, Inc., the plaintiff herein.

2. The materials before the Court on defendants' present application for price increase, fail to fully and

correctly apprise the Court of the relationship between the parties and defendants' obligations to the plaintiffs. These are set forth in the agreement dated May 17, 1949, which was prepared by the Honorable Harold P. Kelly, Esq. prior to his becoming Supreme Court Justice, and which was recorded on the 18th day of May, 1949 in the Erie County Clerk's Office in Liber 4518 of Deeds at page 251, in the following respects (Emphasis supplied by us):

A. NO DELIVERY CHARGE TO BE MADE:

> "All prices fixed under this contract include the cost of delivery of sand, grit and gravel" (¶ 16, 5/17/49 Agreement).
>
> Defendants "shall keep the batcher bins of Frey's batcher plant filled with sand, grit and gravel as may be required from its pits at all times ***" (¶ 15, 5/17/49 Agreement).

B. PRICES TO BE MUTUALLY AGREED UPON:

> Plaintiffs "*** agree to sell and deliver (to Frey) *** sand and grit *** for the prices and upon the terms which shall be agreed to annually between parties hereto and set out on a written schedule signed by both parties to this Agreement" (5/17/49 Agreement, ¶ 13).
>
> "Prices for sand, grit and gravel to be furnished by (plaintiffs to defendants) shall be adjusted and fixed on a separate schedule by

mutual agreement once each year as of April 1 *** Prices are to be prevailing pit prices, less twenty per cent (20%) (5/17/49 Agreement, ¶ 17).

C. PRICE CHANGES BEFORE FEBRUARY 1st:

"If any party to this contract shall desire that a change or a revision be made in the prices of sand, grit or gravel to be sold and delivered under this Agreement effective on and after the 1st day of the following April, such party shall give written notice by registered mail of his request for such change of prices, at least sixty days (60) prior to such first day of the following April. Changes or revisions can only be made to conform with prevailing pit prices" (5/17/49 Agreement, ¶ 17).

D. DISCOUNTS:

"Prices are to be *** less twenty per cent (20%). Two per cent (2%) discount will be allowed if bills for previous month are paid on or before the tenth (10th) day of the following month" (5/17/49 Agreement, ¶ 17).

E. PROHIBITION AGAINST COMPETITORS' ACQUISITION:

No concrete batcher plant may be "erected or operated on the premises *** or on any other property which Pfohl *** now or hereafter may own, lease or operate, while a batcher plant is operated by George C. Frey or his heirs, legal representatives, successors or assigns under this Agreement" (5/17/49 Agreement, ¶ 7).

"Whereas, George C. Frey is engaged in the business of preparing, selling and delivering ready-mixed batches of concrete *** and Pfohl Brothers, Inc. is purchasing all of the foregoing premises, including the premises upon which the batcher plant of said George C. Frey is located, and it is desired by George C. Frey to retain the use of the said batcher plant and to secure sand, grit and gravel for the continuance of its operation" (5/17/49 Agreement, "Whereas" clauses).

F. BINDING ON SUCCESSORS:

"This contract shall be binding in all respects on the successors and assigns of Pfohl Brothers, Inc." (5/17/49 Agreement, ¶ 18).

"This contract shall become effective on June 1, 1949 *** and shall continue for a term of fifteen (15) years *** with the privilege reserved to George C. Frey to renew the said lease upon the same terms in writing of his option to do so by registered mail addressed to Pfohl Brothers, Inc. *** or to their successors or assigns not less than ninety days (90) prior to the termination of the fifteen (15) years provided herein" (5/17/49 Agreement, ¶ 19).

3. I believe that the above quoted excerpts from the Agreement of May 17, 1949 demonstrate the essence and intent of the Agreement and demonstrate the reasons why the prices fixed by the Court's order dated June 9, 1971 on a short temporary basis, which is now stretched to three and one-half (3 1/2) years, is completely unfair and prohibits the competitive

relationship to Frey which was intended to be guaranteed by the above provisions of the Agreement.

4. I believe that it is unfair to require Frey for this extended period to live under the interim order of June 9, 1971, or defendants' presently proposed modifications, when they are so at variance with the basic thought, intent and provisions of the parties' Agreement.

5. When Judge Kelly drew the Agreement of May 17, 1949, he intended it to be as much as possible, a self-executing Agreement under which the parties could live together based upon mutual conferences, negotiations and agreements from time to time to reflect price changes based on other "prevailing pit prices" in the area. Judge Kelly and the parties intended that these other pit prices should be taken into account so that Frey could continue in business as a concrete supplier and continue to compete with Pine Hill which in 1949 had its own washing plant and gravel supply.

6. It was never intended that Pine Hill, Frey's largest competitor, could acquire Pfohl and thereby acquire Frey's gravel washing plant and source of supply. In fact, as noted above, the Agreement specifically prohibited Pfohl or his successors (Pine Hill) from operating a concrete batching plant as long as they owned Frey's former premises and Frey was operating a batching plant thereon.

7. Thus, Pine Hill's acquisition of Frey's batching plant is not only a per se violation of § 1 of the Sherman Act, and § 7 of the Clayton Act, but it is also a violation of ¶¶ 7 and 18 of the Agreement of May 17, 1949.

Lois Muck

Lois Muck

Sworn to before me this

18th day of November, 1974.

Notary Public

F. TERRY SZYMCZYK
Notary Public, State of New York
Qualified in Erie County
Commission Expires 19 76

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN
(ARNOLD WEISS, Esq., of Counsel)
Buffalo, New York, for Plaintiffs.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
(VICTOR T. FUZAK, Esq., of Counsel),
Buffalo, New York
and
MANZ & MANZ (VICTOR E. MANZ, Esq., of Counsel), Buffalo, New York
for Defendants.

On May 7 and June 9, 1971 the court entered orders in an attempt to expedite discovery in this case. Because the defendants had failed to comply with certain previous orders of the court and had failed to take steps to resolve discovery and deposition problems promptly, the court directed that trial counsel for the defendants at that time, who was also President of the Erie County Bar Association, obtain substitute or supplementary counsel to assist him in the preparation of this case for trial. The court took a further step to spur discovery. It provided that the defendants should deliver sand and gravel products to plaintiffs in accordance with the schedule set forth in the June 9 order. At that time it was the court's opinion that the order was fashioned in such a way that early discovery and preparation for trial would be advantageous to both sides. After the order was entered, the parties undertook discovery, held certain depositions and carried out extensive settlement negotiations, without success. While the settlement negotiations were proceeding, both sides stipulated on a number of occasions to adjournment of depositions. In the spring of 1974 Mr. McDonough, defendants' trial counsel, died. The parties now report

to the court that almost all of defendants' depositions of plaintiffs have been completed, but there is still much work to be done. Following the death of Mr. McDonough, the defendants have made arrangements for Victor T. Puzak to act with Mr. Manz as their trial counsel.

At the present time there are pending before the court a number of motions. One made by the defendants seeks an amendment to the order of June 9, 1971 to reflect an increase of price paid by the plaintiffs for sand and gravel. Defendants argue that increased costs of production merit this increase. The plaintiffs oppose this relief. The court has considered the detailed affidavits filed by the parties and, on October 16, 1974, heard testimony from witnesses for both sides. During the hearing on defendants' motion to increase the price of sand and gravel, it was clear that the cost of production had increased and the price paid by other users of sand and gravel in the Western New York vicinity had also increased. Therefore, if the order of June 9, 1971 ought

to be amended, it should reflect an increase in price. However, at this stage of the litigation, it appears to the court that no good purpose would be served by a continuation of the June 9, 1971 order. The purpose of that order was to bring about an early resolution of trial preparation. In that respect it has failed. In part, failure was brought about by the acquiescence of both counsel in stipulating to adjournment of the schedule of depositions set out in the June 9 order without seeking leave of the court. In part, it was caused by the failure of the court to oversee the order and to demand adherence to it. Furthermore, it was revealed at the hearing that the plaintiffs refused to purchase their sand requirements from defendants while insisting that defendants continue to supply them with gravel. According to defendants, this caused an accumulation of sand with adverse financial consequences.

For these reasons, the motion of defendants to modify the order of June 9, 1971 to provide for a new schedule setting forth increased sand and gravel prices is denied. The court will also deny plaintiffs'

motion to continue the June 9, 1971 in effect. Upon the filing of this order, the order of June 9, 1971 is terminated.

Considering the history of this litigation, it appears clear that more direct supervision of discovery is required. In order to bring this about, on October 16, 1974 the court referred the supervision of all discovery to the Magistrate. Following the order of the court, the Magistrate met with counsel on October 21 and October 22, 1974 and the Magistrate entered an order setting forth a detailed plan for discovery and depositions. On October 22, 1974 plaintiffs filed a motion entitled "Notice of Argument of Appeal and Motion" seeking to amend the order of the Magistrate which set forth the order of discovery. The motion of the plaintiffs is denied. The court adheres to its prior order referring questions of discovery and depositions to the Magistrate. This reference is for all purposes and any motions concerning the order or manner of discovery shall be submitted to him. Neither party shall adjourn or modify an order of the Magistrate, or stipulate to a modification without his express written approval.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: November 20, 1974

Notice of Appeal.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

CIVIL NO. 1970-277

vs.

NOTICE OF APPEAL

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

Plaintiffs hereby appeal to the Honorable John T. Curtin, United States District Judge for the Western District of New York, from the order granted orally on October 21, 1974, and signed on October 22, 1974 by the United States Magistrate Edmund F. Maxwell, which:

A. Violated the specific provisions of Rule 26(d) of the Federal Rules of Civil Procedure; and without any findings required to be made by Rule 26(d) "to delay any other party's discovery":

B. Said order purported to deny plaintiffs' motion to forthwith proceed with the depositions and discovery of defendants and their records, and continued to grant defendants priority of examination;

C. Said order denied plaintiff's request to proceed with their depositions and discovery on October 22, 1974;

D. Granted defendants until November 18, 1974 to again commence their depositions and until November 29 to complete the same;

E. Denied plaintiffs any discovery or depositions until December 2, 1974;

F. Permits defendants to carry out their announced plan to file a motion within a week or so, and prior to the time when plaintiffs can have any discovery or depositions, to dismiss this action;

G. Contravened the provisions, spirit and intent of the order of this Court dated October 16, 1974 referring this matter to Magistrate Maxwell;

H. Denied plaintiffs' request that defendants supply substitute counsel because of the engagement of their counsel Victor T. Fuzak;

I. Continues to prejudice plaintiffs, and relegate them to an inferior and disadvantaged position in this litigation; and

J. Otherwise unjustly prejudiced and injured the plaintiffs and deprived them of due process of law, and equal protection of law, in violation of the provisions of the Federal Rules of Civil Procedure, Title 28 of the United States Code, and the provisions of the Constitution of the United States and the amended Articles thereof.

Dated: Buffalo, New York
October 22, 1974.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

Reply Affidavit of Lois Muck.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY and LOIS MUCK as co-executors
of the Estate of GEORGE C. FREY, Deceased,
Plaintiffs,

-vs-

PINE HILL CONCRETE MIX CORP.,
REGENT SAND & GRAVEL CORP.,
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC.,
a dissolved corporation, and
PFOHL BROTHERS, INC.,
Defendants.

CIVIL NO. 1970-277

PLAINTIFFS'
REPLY AFFIDAVIT

STATE OF NEW YORK:
ss
COUNTY OF E R I E:

Lois Muck, being duly sworn, deposes and says:

1. I am Secretary and Treasurer of Frey Concrete, Inc., the plaintiff corporation herein. I make this reply affidavit in answer to the reply affidavits of Norman M. Moran, Robert E. Jones and Melvin E. Becker, all sworn to

Swptember 6, 1974, and in further opposition to defendants' motion for an order allowing an increase in prices charged to plaintiff.

2. Since making my principal answering affidavit dated July 17, 1974, I have received the following additional information which confirms to my mind that defendants are not charging themselves with any increased prices for gravel or trucking -- the reason being that defendants are continuing to charge the same concrete prices that they have charged since 1970, and are attempting to purloin customers from us, using these low prices as an inducement at the same time that they are seeking a retroactive increase in this cost of the gravel prices charged to Frey.

3. There are approximately one and three-quarter tons of grit and gravel in each yard of concrete, and defendants are seeking an average increase of 50¢ per ton for gravel, and 20¢ per ton for trucking, or a total of 70¢ per ton. Therefore, defendants' proposed increase will raise Frey's cost of production of a yard of concrete by 55¢, without any allowance for overhead, interest, etc.

* * *

12. Given the leave of this Court to commence discovery, plaintiffs will make a cost accounting study of Pine Hill's trucking expense and gravel costs and be in a position to report to the Court on the justification for Pine Hill's requested increase. As it is, Pine Hill cites no accounting support for the increase but bases the request on hypothetical and unrelated increases of a general nature in other industries. Pine Hill offers no explanation for its ability to seemingly ignore the alleged increased costs it claims justify the price increase and continues its program of seeking to acquire Frey's customers by holding out the inducement of not raising concrete prices.

13. More specifically, since my last affidavit, Frey Concrete visited a specific former customer which is now doing business with Pine Hill. This customer told Frey that Pine Hill is still charging $22.00 per yard for concrete, less 2%, which is the same price that it has been paying for the last several years.

14. Another customer of Frey Concrete, which also desires to be anonymous, also was visited by Pine Hill's sales representative Sam Prezioso since my last affidavit of July 17. Mr. Prezioso attempted to take this customer

away from us by undercutting our price of $23.70. Specifically, Mr. Prezioso offered the inducement to this customer of the $22.00 per yard price of Pine Hill.

15. Since the date of my last affidavit, we have received additional reports from our salesman in the field that Pine Hill is visiting many of our other customers and attempting to take them away from us with the inducement of continuing to maintain the Pine Hill 1971 price of $22.00 per yard.

16. It appears to me that Pine Hill's present request for an increase in gravel costs and trucking expense is completely inconsistent with Pine Hill's refusal to raise its own concrete prices.

17. Either Pine Hill has not experienced the increased costs that it is alleging to the Court and its present application is without merit and in bad faith; or assuming that Pine Hill has experienced the increased costs which it claims, its application is an attempt to force Frey to raise its concrete prices while Pine Hill continues to hold its concrete prices in an effort to

appropriate Frey's customers and drive Frey out of business. It seems clear that either Pine Hill's application is unfounded and in bad faith, or its motives are predatory and anti-competitive and it is seeking the aid of this Court to accomplish its wrongful objectives of driving Frey out of business.

18. Pine Hill, additionally, has discriminated against Frey, and attempted to drive it out of business, by unfairly manipulating grit and gravel prices, and attempting to pass off inferior quality materials.

19. If Pine Hill had experienced any increased production costs, these costs would be borne equally by its gravel and its grit. However, Pine Hill claims only a price increase for its gravel.

20. Now, its Production Manager, Mr. Jones, states that it is increasing its gravel price because Frey is not buying the grit and, therefore, Pine Hill has stored up a large quantity of grit. Mr. Jones claims that the price increase is placed only on the gravel

raised the price of grit surprisingly enough but only slightly increased the price of gravel.

30. In 1968 Pine Hill raised Frey's gravel price by almost 50%, namely: from $2.20 per ton to $3.20 per ton, or $1.00 per ton, whereas it only raised the price of gravel by 10¢ per ton. The 1968 price increase was apparently intended to hurt Frey as its largest customer which needed the grit in order to make concrete in competition with Pine Hill. In 1968 obviously grit and gravel were still produced on a fifty-fifty percentage, and any increase based upon production costs should have been borne equally. It appears that in 1968 Pine Hill manipulated the grit price to prejudice Frey, and in 1974 it is manipulating the gravel price to hurt Frey. Neither the 1968 nor the 1974 increase are based upon actual cost of production since they are grossly non-linear; whereas, as Pine Hill admits, grit and gravel are produced from the same plant at a fifty-fifty ratio and should share equally in the allocation of any increased production costs, if any.

* * *

been maintained or improved to any extent as compared with the maintenance and improvement of Pine Hill's other plants and from which it acquires the substantial portion of its grit requirements.

37. For example, the grit which Pine Hill furnished Frey after this Court's order of June, 1971, was dirty, contained clay balls, contained deleterious material such as vegetable matter, did not meet gradation requirements, and caused many complaints from Frey's customers.

38. In addition, the grit produced by the Peppermint Road plant contained an excessive amount of moisture. This prejudiced Frey by causing it to pay for the weight of the washing water which sometimes constituted as high as 10% of the weight of the grit rather than a normal of 4% or 5%. In fact, Pine Hill was charging Frey 6% more than list price for this wet grit.

39. The wet grit from the Peppermint Road plant also was unmanageable and packed in Frey's bins

and jammed the cement batching plant slowing production. If Pine Hill had installed a classification tank and dewatering screws on the Peppermint Road plant such as it installed on its Sterling plant, Pavement Road plant and Genesee plant, which it uses for their own concrete grit, this problem could have been eliminated and we would have usable grit.

40. Pine Hill's refusal to modernize and improve the Peppermint Road plant also is an indication of its anti-competitive attitude towards Frey Concrete. The Peppermint Road plant is actually one and one-half miles closer to the raw material source than the Pavement Road plant, and, therefore, cheaper and more convenient. Nevertheless, since 1957 when it acquired Frey's washing plant, Pine Hill has improved and modernized its own plants to cope with the changing raw material supply but completely refused and neglected to modernize and improve Frey's Peppermint Road plant, which was actually closer and more convenient for Pine Hill and the logical plant to be improved. Please keep in mind when Pine Hill bought Frey's plant from Pfohl Brothers much of the equipment needed to update Frey's plant was previously purchased by Pfohl Brothers. Although not installed, it was on the premises however it was later sold off the premises by Pine Hill.

41. The affidavit of Melvin Becker, Pine Hill's Sales Manager, claims in ¶ 8 as follows:

> "It is obvious that Frey Concrete buys from other suppliers of aggregate at cheaper prices than Pine Hill can sell for ***.

* * *

Reply Affidavit of Lois Muck.

47. This becomes more diabolical when it is considered that the grit, according to Pine Hill, has been produced and stockpiled at an earlier time when production costs were apparently lower, and now Pine Hill is attempting to sell gravel at a higher price so that it can dispose of a stock of grit which it produced at lower prices.

48. It is impossible to answer all of the self-serving statements in Pine Hill's affidavits and reply affidavits that it has not engaged in any improper anti-competitive, predatory or unfair practices. Only when Frey is allowed to commence and complete its discovery and depositions of Pine Hill can these self-serving statements be tested to determine whether they are true.

49. The evidence which Frey presents and the symptomatic suffering which it is undergoing from Pine Hill's activities, prove Pine Hill is indeed engaged in a continuing course of conduct to wrongfully drive Frey out of business.

Lois Muck

Sworn to before me this
13th day of September, 1974.

Affidavit of Norman M. Moran.

Def. Sec. 10/4/74 3:45 PM

3/74 N. Moran

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC. GEORGE C. FREY BATCHING PLANT, INC., AND HERBERT FREY AND LOIS MUCK as co-executors of the ESTATE OF GEORGE C. FREY, deceased

Plaintiffs

vs

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP LUDWIG F. KAHLE, JOSEPH PFOHL PAUL M. PFOHL AND FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the Assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants

CIVIL NO. 1970-277

AFFIDAVIT OF NORMAN M. MORAN

STATE OF NEW YORK)
ss:
COUNTY OF ERIE)

NORMAN M. MORAN, being duly sworn, deposes and says:

1. That he is the comptroller of defendant PINE HILL CONCRETE MIX CORP., and is familar with the facts of this proceeding;

2. I have read the September 13, 1974 affidavit of LOIS MUCK and hereby reply to it;

3. I respectfully submit that the affidavit is a rehash of everything that has been said before. It is full of self-serving statements, many based on hearsay; also it contains statements which are incorrect and immaterial, made solely in an attempt to confuse the simple facts and issues involved;

4. For the record, again, PINE HILL is not involved in any illegal practices against FREY CONCRETE or anyother customer or competitor. We only want FREY CONCRETE to pay the prices on our price list for our material. These are the prices all of our customers are now paying;

5. I reiterate PINE HILL does not care whether FREY CONCRETE buys from us or stops buying; Presently we are only supplying them because we were ordered to do so by the Order of this Court on June 9, 1971. It is difficult to comprehend why FREY CONCRETE is forcing us to sell to them and then complaining

that our prices are too high and that they were raised intentionally to drive them out of business. All Frey has to do is buy elsewhere;

6. I would like to EMPHASIZE to the Court, however that economically, PINE HILL, in this current market, can not continue to give FREY CONCRETE a 20% plust 2% discount for volume purchases of No. 1 and No. 2 gravel, unless FREY CONCRETE also purchases its concrete sand (grit) needs, as was provided for in the June 9, 1971 Order;

7. Your deponent again requests that FREY CONCRETE also pay the trucking charge increase we have requested of our other customers and that the increase be held in escrow until the further order of thisCourt. If FREY CONCRETE determines the incre is too high it can hire its own truckers to haul the gravel to its bins;

8. PINE HILL is not seeking to compel FREY CONCRETE to use its trucking service. WE are only doing so, again because of the June 9, 1971 Order of this Court;

9. Your deponent respectfully requests that if we must continue to supply FREY CONCRETE that they be compelled to pay prices from our customers price list effective April 1, 1974, retroactively. Also that FREY be compelled to purchase not only our gravel but also our concrete sand (grit) which has accumulated since FREY stopped buying from us.

In addition that they pay the same trucking charges we bill our customers retroactively to April 1, 1974.

Norman M. Moran
NORMAN M. MORAN

Subscribed and Sworn to before
me this 3 day of October 1974

Notary Public
NOTARY PUBLIC, ERIE COUNTY, NEW YORK
MY COMMISSION EXPIRES MARCH 30, 1976

Plaintiffs' Notice of Production and Discovery.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY AND LOIS MUCK as co-executors
of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

PINE HILL CONCRETE MIX CORP.,
REGENT SAND & GRAVEL CORP.,
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC.,
a dissolved corporation, and
PFOHL BROTHERS, INC.,

Defendants.

CIVIL NO. 1970-277

NOTICE OF PRODUCTION
AND
DISCOVERY.

Plaintiffs request that each defendant is required to produce, for purposes of discovery, inspection and copying by plaintiffs, at the offices of the undersigned, or such other reasonably convenient location as defendants may designate, commencing on Tuesday, December 3, 1974 at 9:30 A.M. and continuing thereafter from day-to-day until completed the below described books, papers, records, documents and articles: of each of the defendants; of each corporation or firm which is, or has been, consolidated, affiliated, related, connected or working therewith, by contract or otherwise; and, of each

individual who is a principal shareholder, manager, officer, agent, representative or manager thereof; for the period 1949 to date.

I. FINANCIAL RECORDS:

A. Financial statements and supporting documentation;

B. Income tax returns, and supporting documentation;

C. Operating statements;

D. Annual and periodic budgets and projections;

E. Computations and projections of unit product costs;

F. Cost accounting records;

G. Projections and computations of product selling prices; and

H. All other related subordinate and supporting financial books, papers, records, documerts and articles.

II. ACQUISITIONS - READY-MIX COMPANIES:

With respect to each of the following described corporations or firms acquired by any of the plaintiffs, produce all documents concerning the acquisition and subsequent operation thereof, or disposition of the business and assets thereof, including but not limited to all acquisition offers,

contracts, agreements and closing statements; all minute books, books of account and other corporate or firm financial and business records; all records of inter-corporate or inter-firm transfers; all documents relating to any dissolution thereof; and financial and operating records; and all other related or similar books, papers, records, documents and things; from 1947 to date:

A. Queen City Ready-Mix Co.;

B. Vero Ready-Mix Co.;

C. Depew Ready-Mix Co.

D. Fago Ready-Mix Div. of Fago Construction Corp.;

E. Genesee Ready-Mix;

F. Sterling Ready-Mix Plant;

G. Bello Road Ready-Mix Plant;

and

H. All other acquisitions of ready-mix plants, corporations or firms.

III. ACQUISITIONS - AGGREGATE COMPANIES:

With respect to each of the following described corporations or firms acquired by any of the plaintiffs, produce all documents concerning the acquisition and subsequent operation thereof, or disposition of the business and assets thereof, including but not limited to all acquisition offers,

contracts, agreements and closing statements; all minute books, books of account and other corporate or firm financial and business records; all records of inter-corporate or inter-firm transfers; all documents relating to any dissolution thereof; and financial and operating records; and all other related or similar books, papers, records, documents and things; from 1947 to date:

A. Buffalo Sand Co.;

B. Pfohl Brothers, Inc.;

C. Sterling Sand and Gravel Co.;

D. Genesee Sand and Gravel Co.;

E. Regent Sand and Gravel Corp.;

F. Meyer and Meyer Sand and Gravel Co.;

G. Stage Farms;

H. Lancaster Sand and Gravel;

I. Buffalo Perolite Corp.;

J. All other acquisitions of corporations or firms producing or selling concrete aggregates in Erie County and any Counties contiguous thereto.

IV. ACQUISITIONS OF OPERATING COMPANIES:

With respect to each of the following described corporations or firms acquired by any of the plaintiffs, produce all documents concerning the acquisition and subsequent operation thereof, or disposition of the business and assets thereof, including but not limited to all acquisition offers,

contracts, agreements and closing statements; all minute books, books of account and other corporate or firm financial and business records; all records of inter-corporate or inter-firm transfers; all documents relating to any dissolution thereof; and financial and operating records; and all other related or similar books, papers, records, documents and things; from 1947 to date:

A. Pfohl Brothers;

B. Quadco Trucking Corp.;

C. Lancaster Sanitary Land Fill, Inc.; and

D. All other similar or related operating companies formed or acquired by any of the defendants.

V. ACQUISITIONS OF GRAVEL AND OTHER LANDS:

A. Piechocki Farm, Alexander, New York;

B. Stage Farms;

C. Pfohl Brothers Lands; and

D. All other lands, including but not limited to lands suitable for gravel, aggregates, land fill, fill removal, or other related or similar lands.

VI. READY-MIX RAW MATERIAL:

With respect to all ready-mix raw materials utilized by defendants, including but not limited to concrete sand or grit, gravel, crushed stone and cement, from 1949 to date, all books, papers, records, documents and articles relating to:

Plaintiffs' Notice of Production and Discovery.

A. Sources and quantities purchased, acquired or produced for each of defendants' plants;

B. Cost of purchase, acquisition or production on an annual and unit basis for each plant;

C. Proposed price lists, prevailing pit price lists, defendants' price list, and competitors' price lists;

D. All contracts, options, purchase orders, agreements, rights or other instruments or documents relating to purchase, acquisition or production;

E. Any discounts, rebates, refunds, credits, benefits, financial advantages, preferences, price adjustments, forgiveness of indebtedness, special terms, or other benefits, considerations, or other effective reductions in direct or related costs;

F. Cost projections, estimates and calculations;

G. Hauling, transportation and delivery costs, expenses, payments, contracts, charges, projections, estimates and calculations;

H. Quality control reports, quality checks, quality complaints, analyses, reports

of consistent or inconsistent quality and quality control standards utilized by defendants for ready-mix raw materials for their own plants and for resale; and

I. All other books, papers, documents or articles relating to the purchase, acquisition or production of raw materials for ready-mix concrete, including the costs, quantity, quality, source and destination thereof.

VII. READY-MIX AND AGGREGATE SALES:

With respect to all products sold by defendants, including but not limited to ready-mix concrete, gravel, grit and aggregates, from 1949 to date, all books, papers, records, documents and articles related to:

A. Price lists;

B. Discount, rebate, refund, and other policies effectively reducing list price, including policies of crediting waiting time;

C. Invoices and delivery tickets;

D. Quantities produced on a plant-by-plant basis;

E. Bids, proposals;

F. Sales contracts or agreements;

G. Selling price projections, estimates and computations;

H. Billings, cash receipt records, account receivable applications and records, credits, forgiveness of indebtedness, return considerations and other return benefits;

I. Simultaneous sales, gifts, donations or rebates of fill, free fill, reduced price fill, or other similar or related benefits;

J. Hauling, transportation and delivery costs, expenses, agreements or payments, all policies of discount, financial advantage, special terms or other benefits to customers, whether or not based on volume;

K. To the extent not governed in ¶ VI hereof, defendants' records relating to its costs of production, acquisition or purchase of said materials or the raw material components thereof;

L. All other similar or related books, records, papers, documents and things; and

M. All supporting documents relating to the foregoing.

Plaintiffs' Notice of Production and Discovery.

VIII. FURTHER RECORDS:

Plaintiffs hereby reserve the right to request such other or further books, papers, records, documents or articles which may be required to prepare for trial.

PLEASE TAKE FURTHER NOTICE, that plaintiffs will commence the depositions of defendants at 9:30 A.M. on Thursday, December 5, 1974, at the offices of the undersigned, or as soon thereafter as defendants have provided plaintiffs with, and they have had a reasonable opportunity to inspect and copy, the foregoing materials.

Dated: Buffalo, New York
November 27, 1974.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 852 7587

TO: MAGISTRATE EDMUND F. MAXWELL
U. S. Courthouse
Buffalo, New York 14202

VICTOR T. FUZAK, ESQ.
HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
Attorneys for Defendants
1800 One M & T Plaza
Buffalo, New York 14203

Affidavit of Norman M. Moran.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased

Plaintiffs

-vs-

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFHOL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants

CIVIL 1970-277

AFFIDAVIT

STATE OF NEW YORK)
: SS.
COUNTY OF ERIE)

NORMAN M. MORAN, being duly sworn, deposes and says:

1. I am the Comptroller of Pine Hill Concrete Mix Corp. (Pine Hill). I make this affidavit in support of objections by defendants to plaintiffs' Notice of Production and Discovery and of a motion on behalf of the defendants for a Protective Order with reference to the Notice of Production and Discovery dated November 27, 1974.

2. Counsel for the defendants is filing an affidavit in support of the motion for a Protective Order. Accordingly, I will limit this affidavit to objections concerning plaintiffs' attempts to obtain inspection of confidential and competitive materials. Upon the basis of a reading of the complaint and advice from our counsel, it is my understanding that the alleged operative facts upon which the claims in this action are premised are recited in Paragraph 27 of the complaint. In summary, those alleged facts purport to assert the breach on or about February 6, 1968 of an alleged contract between George C. Frey and Pfohl Brothers, Inc. dated May 17, 1949, as the basis for claims of violation of the Sherman and Clayton Antitrust Acts.

3. I respectfully submit to the Court that in many respects the plaintiffs are demanding the production of documents and materials which are and have been highly confidential to the defendants, which contain information which it would be harmful for the defendants to be forced to disclose to the plaintiffs as competitors of the defendants, and which are so broad and encompassing as to provide plaintiffs with a free license to go through all of the business records of all of the defendants, whether in any way relating to the issues in this action or not. The Notice would even require the production of the records of corporations or firms which are or have been "consolidated,

affiliated, related, connected or working therewith, by contract or otherwise" and even of any individual who is or was "a principal shareholder, manager, officer, agent, representative or manager thereof". Frey Concrete, Inc., which it has been testified is the surviving corporation of George C. Frey Ready-Mixed Concrete, Inc. and George C. Frey Batching Plant, Inc., is in direct competition with Pine Hill. Another corporation owned by the families of Lois Muck and Herbert Frey--Frey Sand and Gravel, Inc.--is engaged, as is Pine Hill--in the business of producing and selling concrete sand and gravel. Throughout the course of this proceeding both in affidavits and in testimony, the plaintiffs' representatives have repeatedly advised the Court that their business operations are being conducted at substantial losses. The defendants take the position that it is improper and inappropriate to permit competitive concerns to have access to defendants' business records and papers which would disclose confidential operating methods, procedures and costs, and which would assist the plaintiffs in competing with defendants.

4. Defendants object to the production of the documents specified in category I, "Financial Records". All of the records specified under that heading are confidential in nature, are not published, and are not made available to outsiders and certainly not to competitors. I have been advised

by counsel and believe that, in addition, they have no relevance to the issues raised by the complaint. The materials sought contain information having no relationship whatsoever to the allegations of the complaint or to the businesses to which the complaint relates, that is, the ready-mixed, concrete sand and gravel businesses. Items E, F and G would provide these competitor plaintiffs with highly confidential information concerning production and other costs. Since the plaintiffs are in direct competition with Pine Hill with reference to bidding for various jobs and work, the ascertainment of such information by the plaintiffs would provide plaintiffs with confidential information relating to defendants' methods of operation and of preparation of bids with respect to materials which are competitively sold, and would thus result in damage to defendants.

5. With respect to the items sought under IV, "Acquisitions of Operating Companies", the plaintiffs once again seek to go far beyond the allegations of the complaint or the issues raised in this proceeding. For example, there is absolutely no relevancy to materials relating to Quadco Trucking Corp. None of the allegations of the complaint relate to activities of any of the parties in the trucking business. In addition, none of the defendants have any stock holdings in Quadco Trucking Corp. That corporation was not named as a

party defendant in this action. There is pending before the Court an application by the plaintiffs to add that corporation as a party defendant, which has been opposed by the defendants and which is wholly unsupported by any showing on behalf of plaintiffs as to any basis for adding that corporation as a party. The same is true with respect to Lancaster Sanitary Land Fill, Inc. The latter corporation has nothing to do with the businesses which are the subject matter of this action, that is, the ready-mixed, concrete sand and gravel businesses. The operations of that corporation are entirely separate and distinct from the operations of Pine Hill or Regent Sand & Gravel Corp. The corporation is wholly owned by Mr. Ludwig F. Kahle and is not engaged in the ready-mixed concrete business, the concrete sand business or the gravel business. It has no relationship whatsoever to the matters purportedly raised in the plaintiffs' complaint. Its financial records, its minute books, and all of the other records presumably demanded by the plaintiffs' Notice are all confidential. Their disclosure to plaintiffs or to others, besides being unwarranted, would be harmful in terms of providing information which could be used to the detriment of the corporation's business activities or to establish or promote competitive activities by plaintiffs or others.

6. Under V, "Acquisitions of Gravel and Other Lands", plaintiffs seek all information concerning property acquisitions by any of the defendants or the other firms, corporations or persons referred to in the prefatory language, "including but not limited to lands suitable for gravel, aggregates, land fill, fill removal or other related or similar lands". Once again, plaintiffs are attempting to obtain information having absolutely no relevancy to the issues in this proceeding concerning business activities to which this proceeding has no conceivable relationship. In addition, the information sought concerning gravel lands or aggregate lands, [illegible], as the plaintiffs themselves have indicated in testimony, confidential. Testimony given by representatives of the plaintiffs, Mrs. Muck and Mr. Herbert Frey, indicates that the plaintiffs have for many years been involved in seeking out, acquiring, buying and selling, and using properties for the production of aggregates for ready-mixed concrete, including sand and gravel. In the course of an examination before trial of Herbert Frey held on March 5, 1973 in this proceeding, Mr. Frey was asked questions concerning the knowledge of plaintiffs with respect to lands in the County of Erie commercially usable for the mining of concrete sand and gravel. He indicated that there were such lands to his knowledge, but refused to testify as to their location:

"Q. Do you know--can you tell me where they are located?

A. I could.

Q. Will you?

A. No.

Q. Why not?

A. Well, some day there may be a reason that I just may want to get them myself." (Page 90)

Information of this nature is confidential and its disclosure could well put plaintiffs in a position to preempt various properties and to take advantage of defendants work in locating such properties.

7. With respect to VI, "Ready-Mix Raw Material", plaintiffs attempt to obtain essentially all operating information from defendants, all of which again is of a confidential nature, which defendants do not disclose to any outsiders, much less to a direct competitor. Objection is made on these grounds to the demands set forth under Paragraphs A, B, D, F, G, H and I. I have been advised by our counsel and I believe that the institution of an action claiming antitrust violations cannot and should not be used as a device by a competitor to obtain confidential competitive information or to obtain information in aid of the plaintiffs' own business and operations.

8. With respect to VII, "Ready-Mix and Aggregate Sales", objection is made to the items described under K, L and M on the grounds such materials are confidential for the reasons set forth above and their production would produce competitive harm to defendants.

WHEREFORE, for the reasons set forth in this affidavit as well as in the affidavit of defendants' counsel, it is respectfully requested that defendants be granted the relief sought in defendants' Notice of Motion dated December 2, 1974.

s/Norman M. Moran

Subscribed and sworn to
before me this 17th day
of December, 1974.

s/Victor E Manz
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19[illegible]

Affidavit of Victor T. Fuzak.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased

Plaintiffs

-vs-

CIVIL 1970-277

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL H. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

AFFIDAVIT

Defendants

STATE OF NEW YORK)
: SS.
COUNTY OF ERIE)

VICTOR T. FUZAK, being duly sworn, deposes and says:

1. The Notice of Production, consisting of nine pages of demands for a wide variety of records is segregated into seven major areas. The records demanded under each of those seven catagories would require the production of documents from 1947 or 1949. Defendants object to the production of documents relating to matters prior to February, 1968, on the following grounds:

(a) The alleged actions which plaintiffs specify as constituting the claimed wrongs are limited by plaintiffs' complaint to the period "commencing on or about February 6, 1968" (Paragraph 27 of the complaint). Since these are the actions upon which plaintiffs base their alleged causes of action, conduct prior to that time, and documents related to that conduct, are not encompassed by the complaint and are not relevant to the claims asserted.

(b) The effort to require production of a wide and all-encompassing variety of documents and papers from 1947 and 1949 to date from all of the defendants--a period of 25 to 27 years--constitutes an undue imposition upon defendants and a clear harassment of defendants.

(c) Materials sought to be made available for discovery must in the language of Rule 26(b)(1) be " . . . relevant to the subject matter involved in the pending action". Materials sought prior to 1968 are clearly not relevant to the pending action.

(d) The applicable Statute of Limitations concerning antitrust claims is four years (Title 15, USCA Section 15b) after the cause of action accrued.

This action was commenced in June, 1970, and relates by its terms to alleged wrongful conduct commencing in February, 1968. The present attempt to force discovery concerning a period commencing 23 to 25 years before the institution of the action is clearly barred by the Statute of Limitations and by the allegations of the complaint itself.

2. Objection is made to the prefatory language which modifies each of the seven stated catagories. The demand made is impossible of compliance or understanding. Plaintiffs seek to require defendants to produce the demanded documents not only as to defendants themselves, but also " . . . of each corporation or firm which is, or has been, consolidated, affiliated, related, connected or working therewith, by contract or otherwise". The words "related, connected or working therewith by contract or otherwise" besides having no common or ascertainable meaning in the context used, would attempt to impose an impossible burden upon the defendants of producing the books and records of unnamed corporations or firms over which the defendants have no control. In any discovery, there must be some bounds, and the party seeking the discovery must identify in some appropriate degree the documents sought and must demonstrate some relevance to the

issues in the proceeding. The plaintiffs' Notice of Production and Discovery is a blatant fishing expedition by a competitor, to harass and to attempt to overburden defendants by requiring not only the production of virtually all documents and papers in the control of the defendants themselves, but also of documents and papers of corporations or firms "consolidated, affiliated, related, connected or working therewith, by contract or otherwise"--a clear perversion of appropriate discovery proceedings.

This purpose and intent is further demonstrated by the immediately following demand that all of the demanded records referred to in the succeeding seven pages be produced by " . . . each individual who is a principal shareholder, manager, officer, agent, representative or manager thereof". There is no conceivable justification for plaintiffs to demand the production of this wide, diverse and extravagant volume of papers and documents from persons who may be or may have been principal shareholders, managers, officers, agents, representatives, or managers of the defendant corporations or of corporations or firms which are or may have been "consolidated, affiliated, related, connected or working therewith, by contract or otherwise" for a period extending back 25 years to 1940. Deponent submits that it would be difficult to find a more

obvious example of a "fishing expedition" or of an attempt to unduly burden and to harass defendants in an action. Rule 26(b)(1) places the burden on the party seeking discovery of limiting that party's demands to unprivileged matters which are "relevant to the subject matter involved in the pending action". On the face of the demands, the documents sought have no relevance to the claims made by plaintiffs.

3. The plaintiff Frey Concrete Corp. is in direct competition with Pine Hill. Frey Sand and Gravel, Inc., which is owned by the owners of Frey Concrete Corp., is engaged as is Pine Hill, in the business of producing and selling concrete sand and gravel. According to the testimony and the affidavits of the plaintiffs Herbert Frey and Lois Muck, the plaintiffs have been unable to operate their business without substantial losses. Upon information and belief, one of the obvious purposes of this litigation is to obtain access to confidential information of the defendants in order to provide assistance to the plaintiffs in their own operations, and in competing with Pine Hill and others in the field. The Notice of Production and Discovery served by plaintiffs is on its face defective and improper. The extravagant demands for the production of all documents of defendants or of any persons or firms associated in any fashion with defendants over a period of some 27 years itself demonstrates

the fact that the Notice to Produce does not comply with the applicable Federal rules and is an attempt to conduct a "fishing expedition" in the hope of developing some basis for a claim while unduly burdening and harassing the defendants.

4. The essence of plaintiffs' complaint is an alleged breach of a contract between George C. Frey and Pfohl Brothers, Inc. dated May 17, 1949 as to which it is alleged Pine Mill is the successor of Pfohl. The alleged breach occurred on or about February 6, 1968 according to the complaint, continuing to the date of the commencement of the action in June, 1970. The basic claim is that the defendants violated the Sherman and Clayton Antitrust Acts by refusing to provide plaintiffs with the discounted fixed prices ostensibly required by the agreement of May 17, 1949. It is obvious from the face of the Notice of Production and Discovery that the vast majority of the documents demanded by the plaintiffs are not relevant to the subject matter involved in the pending action. Defendants have agreed to produce those papers which have any conceivable relevance to the subject matter of the action.

5. Defendants object to the production of any of the documents described under "I. Financial Records" on the ground that such documents are confidential in nature, that they are not relevant to the subject matter of the action as established

by the complaint, and that their examination by plaintiffs would be competitively harmful to defendants.

6. Defendants object to the production of the documents purportedly required under "II. Acquisitions - Ready-Mixed Companies" prior to February, 1968, on the ground that those documents have no relevance to the subject matter of the action as established by plaintiff's complaint.

7. Defendants object to the production of the documents purported to be required under "III. Acquisitions - Aggregate Companies" with respect to the period before February, 1968, on the ground that such documents have no relevance to the subject matter of the action as established by the complaint.

8. Defendants object to the production of documents purported to be required under "IV. Acquisitions of Operating Companies" on the ground that the demanded documents have no relevance to the subject matter of the action as established by the complaint.

9. Defendants object to the production of the documents purported to be required under "V. Acquisitions of Gravel and Other Lands", on the ground that such documents have no relevance to the subject matter of the action as established by the complaint and are confidential in nature for the reasons

stated in the affidavit of Norman M. Moran, Comptroller of Pine Hill.

10. Defendants object to the production of the documents purported to be required under "VI. Ready-Mix Raw Material", except those documents specified in Paragraphs C and E from February, 1968, on the grounds that the remaining documents specified therein are not relevant to the subject matter of this action as set forth in the complaint and are of a confidential nature as indicated by the affidavit of Norman M. Moran submitted herewith.

11. Defendants object to the production of the documents described in "VII. Ready-Mix and Aggregate Sales", Paragraphs K, L and M in their entirety on the grounds that such documents are confidential in nature as set forth in the affidavit of Norman M. Moran submitted herewith, and on the further grounds that such documents are not relevant to the subject matter of the action as set forth in the complaint. Defendants further object to the production of the documents sought to be demanded under Paragraphs A through J for the period prior to February, 1968, on the ground that such documents are not relevant to the subject matter of this action.

12. The procedure to be employed with respect to the determination of the propriety of the plaintiffs' request for

the production of documents is set forth in Rule 34. By reason of the Magistrate's previous Order, the time periods specified by Rule 34 have been abbreviated and the matter has been brought on for determination by this motion. The substantive provisions of Rule 34 govern. As provided therein, the party seeking discovery may serve a request to produce and permit the copying of designated documents " . . . which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served". Accordingly, the initial prerequisite is that the matters sought to be discovered and copied are within the scope of Rule 26(b), that is, that they are "not privileged" and that they are "relevant to the subject matter involved in the pending action". If they are privileged or not relevant to the subject matter of the action, the request made is improper. Under Rule 34 the party to whom the request is delivered may respond in whole or in part or may object to the discovery sought in whole or in part. If objection is made, the party submitting the request may move to require the production of the designated items. The obligation is on the moving party seeking discovery to satisfy the Court that the items sought "constitute or contain matters within the scope of Rule 26(b)", that is, that they are not privileged and are " . . . relevant to the subject matter involved in the pending action".

WHEREFORE, defendants request that the Protective Order sought in the Notice of Motion dated December 2, 1974 be granted and that the expenses incurred by defendants in relation to this motion as provided in Rule 37(a)(4) be awarded to defendants.

s/ Victor T. Fuzak

Subscribed and sworn to
before me this 17th day
of December, 1974.

s/ Carole L. Zeiher

CAROLE L. ZEIHER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 76

Affidavit of Arnold Weiss.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY AND LOIS MUCK as co-executors
of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

PINE HILL CONCRETE MIX CORP.,
REGENT SAND & GRAVEL CORP.,
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL and FIDELIS M.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC.,
a dissolved corporation, and
PFOHL BROTHERS, INC.,

Defendants.

CIVIL NO. 1970-277

AFFIDAVIT
OF
ARNOLD WEISS.

STATE OF NEW YORK:
COUNTY OF E R I E: ss
CITY OF BUFFALO:

ARNOLD WEISS, being duly sworn, deposes and says:

1. I am plaintiffs' attorney of record herein and make this affidavit in opposition to defendants' motion dated December 2, 1974 for a protective order vacating and deleting major portions of plaintiffs' notice of production and discovery dated November 27, 1974.

2. I hereby incorporate herein the annexed affidavit sowrn to December 27, 1974,of Elwin G. Day whom I have requested to assist me in examining defendants records and in preparation of exhibits and evidence for trial.

3. The following chart, and Mr. Day's affidavit, summarizes the principal reasons why we require the material for the trial, and the relevancy and propriety thereof:

REQUESTS TO WHICH DEFENDANTS OBJECT	NECESSITY, RELEVANCY AND PROPRIETY OF PLAINTIFFS' REQUESTS
Request No. I.	I.
Financial Records.	Defendants' financial records show defendants': market position and dominance; discriminatory pricing policies; absorbtion of price increases; rebates; discounts; below-cost sales; non-uniform pricing policies; monopolization; monopoly profits; aggregate and ready-mix production costs; aggregate inter-company prices and discounts; inter-company subsidies of ready-mix losses with profits from aggregate sales, trucking, landfill, and other strategems; etc.
Request No. II.	II.
Acquisition of ready-mix companies prior to 1968.	Defendants have attempted to monopolize and restrain competition in the ready-mix market by their acquisition of at least

seven ready-mix plants, all prior to 1968. Defendants have also then utilized these acquisitions to restrain competition in and to monopolize the ready-mix business; and to implement their anti-competitive pricing, rebate, discount, and sales policies, etc.

Request No. III. Acquisition of aggregate companies prior to 1968, (except for defendants' acquisition of Pfohl Brothers, Inc. in 1957).	III. Defendants have attempted to monopolize and restrain competition in the aggregate market by their acquisition of at least ten aggregate companies, all prior to 1968. These acquisitions also included acquiring plaintiffs' own source of gravel supply from Pfohl Brothers. Defendants have also utilized these acquisitions to restrain competition; to monopolize the ready-mix, as well as the aggregate business, by attempting to cut-off, and raise to an exorbitant price-level, plaintiffs' aggregate sources; artificially raising aggregate prices; and utilizing profits from aggregate sales to subsidize below-cost ready-mix sales; etc.

Requests Nos. IV & V

Acquisition of operating and gravel companies.

IV & V.

The following operating and gravel companies are apparently used by Pine Hill to finance its below-cost ready-mix sales:

A. Pine Hill has been charging plaintiffs 70¢ to 90¢ per ton for trucking, which trucking defendants claim is performed by an "independent trucker", viz.: Quadco Hauling Corp. However, plaintiffs have learned that Quadco is owned by defendant Ludwig Kahle and operated by Pine Hill. It appears that during operating months, Quadco reimburses Pine Hill as much as $11,000 per month.

B. Regent Sand & Gravel, Inc. is not only a defendant, but is the record owner of plaintiffs' former washing plant premises which Pfohl Brothers sold to Pine Hill (which then transferred it to Regent). Regent is operated and managed by Pine Hill for an annual sum of over $10,000.

C. Lancaster Sanitary Landfill, Inc. is also managed and operated by Pine Hill. It appears that Lancaster reimburses Pine Hill as much as $45,000 per month.

D. Stage Farms, Inc. (gravel company) is similarly managed or operated for the sum of $200.00 per month.

E. Piechocki Farms was land acquired by defendants without any means of entry, for the apparent purpose of blocking plaintiffs' Alexander gravel operations.

Requests Nos. VI & VII.	VI & VII.
Ready-Mix and Aggregate Raw Materials and Sales (Except ¶ VI, C & E from 1968 to date).	Defendants have arbitrarily and unfairly raised grit, gravel and trucking prices for the double-edged purpose of increasing plaintiffs' ready-mix production costs and prices, and increasing defendants' gravel profits for use by defendants as a subsidy to finance predatory and discriminatory ready-mix price cuts by defendants. For example, defendants have thus been able to maintain a $22.00 per yard price for the

past 3 1/2 years despite materials price increases which greatly exceed their profit margin.

Defendants have also been able to grant large discounts to ready-mix customers, formerly served by plaintiffs, which effectively cut their price to $20.50 per yard. Plaintiffs meanwhile, with defendants high gravel, grit and trucking charges, were forced to a $23.70 price, and are losing money at that price.

Defendants have also apparently granted other rebates, discounts and benefits to customers in an attempt to monopolize and restrain the ready-mix and aggregate business.

Requests I thru VII.

1949 to Date (Defendants consent to 1968 to date on certain items).

I - VII.

Defendants erroneously claim that the complaint does not go back before 1968. Reference to the complaint shows that it alleges:

¶ 5. Defendant Kahle was controlling shareholder of Regent, Pine Hill and

Pfohl since 1957, etc.

¶ 7. Pfohl was dissolved in 1957 by Kahle, etc.

¶ 18. On May 17, 1949 plaintiffs sold their premises to Pfohl.

¶ 22. The hereinafter alleged acts (8/1/57 and subsequent) were part of a conspiracy by defendants to monopolize trade and commerce in the ready-mix and aggregate businesses, etc.

¶¶ 23 & 24. On August 1, 1957 Kahle and Pine Hill purchased Pfohl Brothers, and by reason thereof, plaintiffs' premises then reverted back to plaintiffs.

¶¶ 25 & 26. On May 1, 1969 Pfohl, Regent, and Kahle and Pine Hill attempted to reform the August 1, 1957 transaction.

¶ 27. Since February 6, 1968, defendants breached the aforesaid May 17, 1949 agreement.

¶ 28. The aforesaid actions (August 1, 1957 and later) of defendants were for the purpose of driving plaintiffs out of business by monopoly power.

¶ 29. Damages are not limited to 1968 to date, but request damages to be fixed by Court (within the period of the statute of limitations).

¶¶ 33, 37, 38 & 42. Defendants have breached the May 17, 1949 agreement.

4. During defendants' depositions and discovery of plaintiffs, counsel agreed to a plan to expedite discovery, and eliminate objections because of the competitive nature of the parties, any records requested by defendants, would in turn be furnished by defendants to plaintiffs when plaintiffs' discovery period commenced.

5. This appears from the depositions on the following pages:

Date of Deposition	Page	Subject
5/3/73	48	Chronological list of transactions from 1946 to date.
5/6/73	180-1	Land options from 1945 to date.

Affidavit of Arnold Weiss.

Date of Deposition	Page	Subject
5/6/73	188-9	Income tax returns for all related companies for 1949 to date.
"	194-5	Purchase records 1949 to date
"	197-9	Sand, grit, gravel and aggregate purchase records for 1958 to date for Pine Hill and Regent.
"	264-6	Ready-mix contracts, offers, proposals, etc. 1968 to date.
"	268-9	Rebates, discounts, gimmicks, 1968 to date.
5/13/74	301-7	General agreement on reciprocity on documents, except only as to the Lancaster Sanitary landfill business.
	323-6	Bids and proposals.

Arnold Weiss

Sworn to before me this

27th day of December, 1974.

[illegible]
Notary Public, State of Texas
Qualified in this County
My Commission Expires March 30, 1976

Affidavit of Elwin G. Day.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY AND LOIS MUCK as co-executors
of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

PINE HILL CONCRETE MIX CORP.,
REGENT SAND & GRAVEL CORP.,
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC.,
a dissolved corporation, and
PFOHL BROTHERS, INC.,

Defendants.

CIVIL NO. 1970-277

AFFIDAVIT
OF
ELWIN G. DAY

STATE OF NEW YORK:
ss
COUNTY OF E R I E:

ELWIN G. DAY, being duly sworn, deposes and says:

1. I am a certified public accountant and a member of the firm of Lathan, Lumsden, McCormick and Co., which has offices at 120 Delaware Avenue, Buffalo, New York 14202.

2. Our firm has been employed by Frey Concrete, Inc. as its auditors in connection with the annual audit of the books and records of Frey Concrete, Inc.

3. During defendants' pretrial discovery of the books and records of Frey Concrete, Inc., deponent assisted in presenting the books and records to defendants' representatives and was present at Frey Concrete's offices during a portion of the time that defendants' representatives conducted their examination.

4. At the request of Arnold Weiss, Esq. of the firm of Raichle, Banning, Weiss & Halpern, attorneys for Frey Concrete, Inc., deponent has agreed to assist Mr. Weiss's law firm in its examination of defendants' books and records and in preparing evidence, exhibits and proof for the trial of this action. Deponent has arranged for Mr. James Neill, the Office Manager of Frey Concrete, Inc., to assist deponent in said task and to work under his direction and control.

5. Deponent participated with Mr. Weiss in the drafting of plaintiffs' "Notice of Production and Discovery", dated November 27, 1974, and said Notice of Production lists those papers which deponent requires, from an accounting point of view, to prepare the exhibits, documents and evidence required by plaintiffs' counsel for the trial of this action.

6. Deponent has examined defendants' Motion, dated December 2, 1974, requesting this Court to delete from plaintiffs' Notice of Production and Discovery certain items of an accounting nature, including "I. Financial Records"; "VI. Ready-Mix Raw Material" (everything except items C and E from 1968 to date); and "VII. Ready-Mix and Aggregate Sales" (¶¶ K, L. and M, and restricting ¶¶ A through J to the period 1968 to date).

7. In deponent's opinion, it is necessary for deponent to examine defendants' Financial Records, as outlined in ¶ "I" of plaintiffs' Notice in order to prepare for the trial herein, exhibits and evidence showing to what extent defendants have been:

(a). Selling ready-mix concrete at various periods to various customers, and at certain periods to all customers, below-cost or at an operating loss;

(b). Cutting ready-mix prices below production cost;

(c). Absorbing increases in production costs in excess of defendants' normal profit margin;

(d). Unilaterally initiating price cuts without any need to meet competition;

(e) Subsidizing ready-mix loss prices by income from landfill, trucking and gravel operations; and

(f). Fixing selling prices on a discriminatory or anti-competitive basis rather than a cost-accounting and realistic projection basis.

8. In deponent's opinion, it is necessary for deponent to examine defendants' business records relating to its actual net cost of raw materials for producing ready-mix concrete, as outlined in ¶ "VI" of plaintiffs' Notice, and its sales and income records relating to ready-mix concrete and aggregate sales as outlined in ¶ "VII" of plaintiffs' Notice in order to prepare for the trial herein, exhibits and evidence showing to what extent defendants have been:

(a). Realizing a profit, rather than claimed losses, on sales of grit and gravel to plaintiffs;

(b). Realizing a profit, rather than claimed losses, on trucking expense charged to plaintiffs;

(c). Utilizing subsidiaries or affiliates, such as defendant Regent Sand & Gravel, Quadco Trucking, Lancaster Sanitary Landfill, and other such corporations, to artificially peg material and service costs to justify price increases to plaintiffs;

(d). Raising prices of grit and gravel to plaintiffs without corresponding increases in production cost;

(e). Supplying other customers at discriminatory discounts, rebates or other preferences;

(f). Preparing price lists on a discriminatory or artificial basis rather than a cost-accounting or projected basis;

(g). Utilizing profits realized from sale to plaintiffs of grit and gravel at artificially elevated prices in order to finance ready-mix concrete sales at below-cost prices, or to grant discriminatory rebates to customers;

(h). Gra·ting discriminatory discounts, rebates, benefits or advantages to customers either in pricing, billing, account receivable discounts, year-end bonuses, year-end forgiveness of indebtedness, unbilled sales or other methods;

(i). Operating more efficiently than plaintiffs, as claimed by defendants, or instead operating much less efficiently than plaintiffs, as claimed by plaintiffs,

and thereby utilizing discriminatory methods to compensate for defendants' inability to compete on a normal business basis;

(j). Obtaining discounts or advantages from cement and other raw material suppliers, not enjoyed by plaintiffs or other concrete ready-mix producers;

(k). Fixing concrete ready-mix prices based on anti-competitive and discriminatory purposes, or based upon a cost-accounting or projected basis;

(l). Pricing ready-mix concrete on a normal or projected basis or on an anti-competitive hit-and-miss basis designed to take away plaintiffs' customers; and

(m). Granting customers illegal refunds, favors, credits, reductions, free or reduced price fill, gifts, free or reduced price trucking, or other economic benefits designed to effectively reduce defendants' ready-mix selling prices.

9. On December 16, 1974 deponent appeared at the office of Pine Hill Concrete Mix Corp. and requested those items outlined in plaintiffs' Notice of Production and Discovery, dated November 27, 1974, as to which defendants made no objections.

10. The records furnished to deponent were only for the period from 1968 to August, 1974 (Mr. Moran refused to furnish certain records from September 1, 1974 to date).

11. The records furnished included ready-mix quotation and customer order files; ready-mix sales invoices and delivery ticket; cash receipt journal; journal indicating ready-mix yardage shipped by month and by plant location; and published price lists for concrete and aggregates.

12. The records furnished are insufficient to enable deponent to make any accurate determinations of defendants' actual selling prices, discounts, rebates, subsidies, benefits, lost sales, etc.

13. For example: In the course of examining defendant Pine Hill's cash receipts journal, we noted several large credits to accounts receivable which were much larger than the normal 2% cash discount. The information and records provided by Pine Hill did not explain these credits. It is

necessary for deponent to examine the detail accounts receivable customer cards, and the cash disbursement records, to determine if any additional credits, rebates, forgivenesses or other benefits have been allowed.

14. It is also necessary for deponent to examine the cash disbursement records and associated invoices and vouchers in order to determine whether there is any relationship between concrete costs and concrete selling prices.

15. Normal accounting procedures require access to all of the books of original entry and supporting documents in order to receive assurance that there are no additional invoices and customer records or entries.

16. During deponent's examination of the limited material furnished, deponent discovered inter-company billings for administrative services, equipment rentals, manpower charge-backs, etc. No detail or information was furnished as to the calculation of these charges, which based on the test months examined could total approximately $500,000.00 for the current year. Without further records, deponent is unable to determine the reasonableness or excessiveness of these inter-company billings. In this connection, it is also necessary to have access to the records of the associated companies which submitted, and were paid, these substantial inter-company billings, including Quadco Trucking Corp., Lancaster Sanitary

Landfill Corp., etc. in order to determine the basis of these charges, how they were recorded on the books of the company being billed, and if they are in effect a subsidy of Pine Hill's ready-mix operations.

17. Deponent will be unable to arrive at a conclusion, or to prepare adequate exhibits or evidence concerning defendants' pri[illegible] policies and its use of inter-company charges and activities, unless deponent is allowed to inspect the requested records.

18. During defendants' examination of plaintiffs' books and records, at which deponent was present, we furnished defendants whatever records they requested, including the records of the same nature as plaintiffs are now requesting of defendants.

Elwin G. Day

Sworn to before me this
27th day of December, 1974.

F. TERRY SZYMCLYK
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19[illegible]

Defendants' Motion to Dismiss Complaint and for Summary Judgment.

RECEIVED
1975
GABRIELE, BALLARINO, WEISS & HARPER
POST MAILED Rec. 4/84
Filed 1/13/75

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased

Plaintiffs

-vs-

NOTICE OF MOTION

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

CIVIL 1970-277

Defendants

Defendants move the Court for judgment in favor of defendants pursuant to Rule 12 of the Rules of Civil Procedure dismissing the complaint and awarding attorneys fees to defendants, and for summary judgment in favor of defendants dismissing the complaint and awarding attorneys fees to defendants pursuant to Rule 56 of the Rules of Civil Procedure, on the following grounds:

1. That the complaint fails to state a claim upon which relief can be granted;

2. That the Court does not have jurisdiction over the parties or over the subject matter of this action;

3. That defendants are entitled to summary judgment dismissing the complaint on the basis of the affidavits filed in support of this motion, affidavits previously filed by the parties to this action, the hearings and proceedings heretofore had, the depositions of defendants and applicable law;

4. That plaintiffs' claims are barred by the Statute of Limitations.

Defendants will seek a judgment of this Court as follows:

a) Dismissing the complaint on the merits as to all defendants;

b) Awarding attorneys fees to defendants with respect to this action in such sums as may be determined by the Court;

c) Affording defendants such other and further relief as to the Court may determine appropriate in the premises.

PLEASE TAKE NOTICE, that these motions will be brought on for argument at a motion term of this Court to be held on Monday, January 20, 1975 at 11 o'clock a.m. at the United States Courthouse, Niagara Square, Buffalo, New York.

Dated: Buffalo, New York
January 10, 1975.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

By s/ Victor T. Fuzak
Victor T. Fuzak
A Member of the Firm
Attorneys for Defendants
Office and Post Office Address
1800 One M & T Plaza
Buffalo, New York 14203
Telephone: 856-4000

Affidavit of Norman M. Moran.

RECEIVED
JAN - 6 1975
RAICHLE, [illegible], WEISS & [illegible]
POST MARKED Pers. 4/80

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC. GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased

Plaintiffs

-vs-

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants

AFFIDAVIT ON MOTION FOR DISMISSAL

CIVIL 1970-277

STATE OF NEW YORK)
: SS.
COUNTY OF ERIE)

NORMAN M. MORAN, being duly sworn, deposes and says:

1. I am the Comptroller of Pine Hill Concrete Mix Corp. (Pine Hill). I make this affidavit in support of an application by the defendants for dismissal of the complaint, for summary judgment and for other relief described in the Notice of Motion.

2. The plaintiffs premise jurisdiction of the Court upon allegations in the complaint of alleged violations of the Sherman and the Clayton Antitrust Acts. The complaint contains other alleged causes of action over which, I am advised by counsel, this Court would obviously have no jurisdiction except through pendant jurisdiction based upon an initial finding of jurisdiction under the federal antitrust statutes. Accordingly, defendants respectfully submit that the threshhold question for determination by the Court, before it can reach consideration of the various alleged causes of action is whether the activities complained of are in interstate commerce as prescribed in the Sherman and Clayton Antitrust Acts.

3. I am advised by defendants' counsel and believe that the interstate commerce requirements of these Acts are not satisfied by the complaint or by the facts of this situation. This affidavit will set forth specific allegations of fact which cannot legitimately be denied by the plaintiffs, and which establish conclusively that this Court does not have jurisdiction to consider the claims sought to be raised in the complaint. I am advised by my attorneys and I believe that this action has been improperly commenced in this Court, and that if the plaintiffs have any rights with respect to the transactions referred to in the complaint, those rights are subject to the sole and exclusive jurisdiction of the Courts of the State of New York.

4. I am advised by my attorneys and I believe that for this Court to have jurisdiction over claims of alleged violations of the Clayton Antitrust Act (Title 15,USCA, Section 12, et seq.) the burden is on the plaintiffs to prove that the actions complained of are "in commerce", that the "commerce" to which reference is made is "trade commerce among the several states and with foreign nations", and that the sales of products which allegedly give rise to the claimed violations of the Act must be sales occurring in interstate commerce.

5. I affirm by this affidavit the fact that at all times in question with respect to the instant action, none of the defendants Pine Hill, Regent Sand & Gravel or Ludwig Kahle were, have been or are engaged in making sales of concrete sand (grit), gravel or ready-mixed concrete in interstate commerce. All sales of any of those products have at all times been to purchasers located within the State of New York, and in fact, within the local area which the plaintiffs refer to in their complaint as Western New York. At no time have any of the defendants made any sales of sand, gravel or concrete to any purchasers located outside of the State of New York. Upon information and belief, the same is true with respect to the plaintiffs. As indicated in the plaintiffs' own complaint (Paragraphs 10, 11, 13-27), the business to which the claims in

the complaint relate is the business of mining, producing and selling concrete sand (grit) and gravel from plants and premises located in the County of Erie to purchasers engaged in business and located in

the Western New York area, and the business of manufacturing, in plants located in Erie County, ready-mixed concrete which is sold to purchasers located in the immediate Buffalo area and in Western New York for use by those purchasers in various construction projects and buildings located in Western New York. There are and have been no sales by either the plaintiffs or the defendants of concrete sand, gravel or ready-mixed concrete in interstate commerce. All sales are and have been local, that is, within the State of New York and indeed, within those few counties comprising what is commonly known as the Western New York area. Accordingly, I am advised by our attorneys and I believe that since there are no sales of the products in question in interstate commerce, the jurisdictional requirements of the Clayton Antitrust Act are not satisfied and that the Court consequently does not have jurisdiction to consider and adjudicate the plaintiffs' claims of violations of that Act.

6. I am further advised by our attorneys and I believe that in order for this Court to have jurisdiction of claimed violations of the Sherman Antitrust Act (Title 1 USCA, Section 15 et seq.) the burden is on the plaintiffs to plead and to be able to establish that the alleged illegal conduct is "in restraint of trade or commerce among the several states, or with foreign nations". I am advised by our attorneys and I believe that the Supreme Court of the United States and the various Federal

District Courts and Courts of Appeals, have established that in order for the federal courts to have jurisdiction to consider and to adjudicate allegations of contracts, combinations or conspiracies in restraint of trade, as prohibited by the Sherman Antitrust Act, the plaintiffs must be able to establish that the complained of conduct is in interstate commerce or that it is conduct which substantially affects interstate commerce. There are no factual allegations in the complaint to support the conclusory allegations of the complaint--which are in the nature of "boiler plate" assertions of jurisdiction--that the conduct complained of is in interstate commerce or has any substantial effect upon interstate commerce. There are no assertions in the complaint that any of the plaintiffs or the defendants are or have been making any sales of sand, gravel or ready-mixed concrete outside of the State of New York. There are no factual allegations to show that any of the actions complained of have any effect whatsoever upon interstate commerce. On the contrary, it is apparent from the face of the complaint itself, and from the plaintiffs' own allegations therein, that the relevant market to which reference is made is entirely local, that is, the Western New York market, that there are no sales or activities in interstate commerce by either plaintiffs or defendants, and that the business of manufacturing, producing and selling concrete sand, gravel or ready-mixed concrete is in fact, and by virtue of economic and practical necessity, entirely local in character and in no respect interstate. I respectfully direct

the Court's attention to the testimony given to the Court on October 16, 1974 by Mrs. Lois Muck, one of the plaintiffs and an officer of the plaintiff corporations, that the market for the materials produced and sold by the plaintiffs and defendants is entirely within Western New York.

7. All transactions between the plaintiffs on the one hand and the defendants on the other have been and continue to be entirely intrastate.

8. All transactions between the defendants and its customers are entirely intrastate. Defendants have no customers to whom or to which defendants sell or offer for sale concrete sand, gravel or ready-mixed concrete which are located outside of the State of New York.

9. All products sold by the defendants are sold for local intrastate use, and are in fact used locally and within the State of New York. None of those products are purchased for transshipment by the purchaser outside of the State of New York. All of those products are incorporated into various construction projects in Western New York. None of those products are incorporated into goods or products which are themselves shipped by the purchaser from defendants outside of the State of New York.

10. All parties to this action are either local residents of the County of Erie or are corporate entities organized and existing under the laws of the State of New York, with their offices for the transaction of business being located within the State of New York, and indeed, within the County of Erie.

11. None of the defendants are or have been engaged in the sale or purchase of any materials destined for consumption or transportation outside of the State of New York.

12. Upon information and belief, none of the plaintiffs are or have been engaged in the sale or purchase of any materials destined for consumption or transportation outside of the State of New York.

13. Upon information and belief, the sand and gravel produced and sold by the plaintiffs has never moved in interstate commerce.

14. The sand and gravel produced and sold by the defendants has never moved in interstate commerce.

15. Upon information and belief, the ready-mixed concrete produced and sold by the plaintiffs has never moved in interstate commerce.

16. The ready-mixed concrete produced and sold by the defendants has never moved in interstate commerce.

17. The structures into which the sand, gravel or ready-mixed concrete sold by either the plaintiffs or the defendants have never moved in interstate commerce.

18. In short, the ready-mixed business of the defendants has not been and is not in interstate commerce. On the contrary, by the nature of the business, and as is apparent from the statements of fact contained in this affidavit and in other materials before

the Court, the activities of both the plaintiffs and the defendants are peculiarly local and intrastate in character. The concrete sand and gravel produced by plaintiffs and defendants are extracted in raw form from real property entirely situated within the State of New York. The bank run materials thus extracted are then processed through washing plants, also located entirely within the State of New York, which by means of washing and screening processes separate out, clean and grade the various sizes of gravel and the concrete sand. The products thus produced are then sold to purchasers within the State of New York who incorporate those products directly into various local construction projects or into ready-mixed concrete which itself is incorporated into construction projects located wholly and solely within the State of New York.

19. The complaint is totally devoid of any factual allegations to support the wholly conclusory and false claims that the alleged activities of the defendants were or are in interstate commerce. On the contrary, the allegations of the complaint describing the various business activities of the parties to this suit (Paragraphs 13 through 21) demonstrate very clearly that all of the activities alleged are local in nature, confined within the State of New York, and indeed, largely within the County of Erie. Those paragraphs of the complaint relating to the alleged wrongful actions and alleged

conspiracy of the defendants (Paragraphs 22 through 30) deal wholly and solely with local intrastate transactions and activities and contain no factual allegations to support the conclusory claims of interstate commerce.

20. The second claim made in the complaint against the defendants is for alleged violation of provisions of the New York General Business Law. This Court, I am advised, obviously has no jurisdiction over alleged violations of New York State law unless the primary claims in the matter are such as to raise federal questions over which the Court would have jurisdiction. Since that is not the case, and since, as I am advised, the Court in any event does not have jurisdiction over the alleged second claim, it is respectfully requested that this claim be dismissed on the grounds of lack of jurisdiction.

21. The third claim in the complaint (Paragraphs 32 through 35) alleges a breach of contract, which, of course, is not subject to federal jurisdiction except under the conditions described above.

22. The fourth claim in the complaint (Paragraphs 36 through 39) attempts to set forth a right to have real property in New York State deeded back to the plaintiffs or some of them. Once again, this is not an appropriate claim for consideration by this Court and the Court does not have jurisdiction of either

the subject matter or of the parties. The same comments apply to the alleged fifth claim (Paragraphs 40 through 42).

23. The sixth claim in the complaint (Paragraphs 43 through 45) is a catchall type of statement again dependent for consideration on the jurisdiction of the Court. For the reasons stated above, the Court has neither jurisdiction over the subject matter of this claim or of the parties.

24. The defendant Ludwig F. Kahle does not engage in interstate commerce. The defendant Ludwig F. Kahle is not individually engaged in the sand, gravel or ready-mixed concrete business. He owns stock in Pine Hill, and in Jamison Bank Run Gravel Corp. which has its principal offices at 2255 Bailey Avenue, Buffalo, New York, and which is engaged, entirely within the State of New York, in the business of mining sand and gravel and selling the same in intrastate commerce. The defendant Kahle resides and has resided at 96 Huntley Road in Buffalo, New York. The defendant Kahle is not engaged in interstate commerce with reference to the gravel, sand or ready-mixed concrete business. The defendants Joseph and Fidelis Pfohl reside and have resided in Erie County, New York. None of the individual Pfohl defendants individually engaged in the business of gravel, sand or ready-mixed concrete. All of them are stockholders of Lancaster Stone Products Corp. located at 5833 Main Street in Buffalo, New York, which is engaged in the general business of

producing crushed stone and bituminous concrete. That corporation, which is not a defendant in this action, also maintains premises for these purposes at Barton Road in Lancaster, New York. Neither that corporation nor the individual defendants Pfohl have been or are engaged in the sale of any gravel, sand or ready-mixed concrete products to any purchaser outside of the State of New York or outside of this country. With respect to the gravel, sand and ready-mixed concrete business, none of the individual defendants, nor the corporation in which they have an interest, Lancaster Stone Products Corp., are engaged in interstate commerce. In short, all of the activities of the defendants in this action insofar as they relate to the area of business concerning which antitrust claims are made in the complaint are local and intrastate. Both Pine Hill and Regent Sand, as well as the dissolved corporation Pfohl Brothers, Inc., were and are corporations organized under the laws of the State of New York and maintaining all offices for the transaction of business within the State of New York. There is no diversity of citizenship as between the plaintiffs and the defendants. The complaint in this action does not contain any factual allegations to the effect that any of the defendants are in any way engaged in interstate commerce with reference to the area of business with which the complaint is concerned.

25. With respect to the business in Western New York of producing concrete sand and gravel for use in the production of ready-mixed concrete, defendants wish to point out to the Court the following facts:

a. The plaintiffs, through Frey Sand & Gravel Corp., lease gravel properties in Alexander, New York, which is approximately 20 road miles from plaintiffs' ready-mixed plants in Lancaster, New York. Frey Sand & Gravel Corp. is owned by the same stockholders (the families of Herbert Frey and of his sister Lois Muck) as own Frey Concrete Corp., the surviving corporation to the named plaintiffs (19-22).*

b. According to the testimony of Herbert Frey, the plaintiffs have substantial supplies of high quality gravel at the Alexander pits (3/5/73; 105) comprising 500 acres from which they have been taking aggregates since 1957 (3/13/73; 374).

c. The plaintiffs have supplied their ready-mixed concrete plant on Union Road in West Seneca with concrete sand and gravel from their Alexander pits (97, 165).

d. The road distance between the Alexander pits and the plaintiffs' West Seneca ready-mixed (batching) plant is greater than the distance to plaintiffs' Lancaster batching plants.

---

* Unless otherwise indicated, parenthetical numerical references are to pages of the transcript of examinations under oath of plaintiffs.

e. The plaintiffs have obtained supplies of sand and gravel from the Alexander pits for their Lancaster batching plants (195, 1017-19).

f. According to the testimony of Herbert Frey, the prices charged to plaintiffs by Frey Sand & Gravel, Inc. are the regular retail prices for all customers less a $.10 a ton discount (332).

g. The plaintiffs have never made a determination as to the comparative actual cost of obtaining concrete sand or gravel from their Alexander gravel pits for use in their Peppermint Road plant as contrasted with the cost of obtaining sand and gravel from Pine Hill or from other area sellers of sand and gravel (1072, 1088, 1082):

> "Q. Now, did you do an analysis to find out what it would cost you to provide the Plaintiff corporation with concrete sand from Alexander to the Peppermint Road Plant, based on the actual cost of production to Frey Sand & Gravel Corp. of this concrete sand, rather than the list price?
>
> A. No. I think what you are aiming at, can we produce it a lot cheaper if we were possibly consuming our own products, not selling to somebody else. I don't believe we done anything like that." (H. Frey, 1087-8)

h. Although plaintiffs have made repeated claims to the Court of large losses in the operations of Frey Concrete, Inc.,

plaintiffs' president has testified that plaintiffs refuse to obtain gravel from their pits in Alexander for use in their Peppermint Road batcher plant because of an unwillingness to divert those supplies from other customers of Frey Sand & Gravel, Inc.:

"Q. What I'm asking about is, whether or not any kind of a computation has been made to your knowledge, let's take it first from the Plaintiff corporation's standpoint, as to the actual cost of a delivered ton of number one gravel from Frey Sand & Gravel at Alexander, to your Peppermint Road Plant in Lancaster?

A. I don't think we particularly run a particular analysis on it. We have looked into it, but you got to keep in mind too, if we remove the number one gravel from our Alexander Plant, we are going to curtail sales of other products in that area." (H. Frey, 1072-3)

"Q. Sure, I'll try to rephrase that. Did you ever make any kind of an analysis to determine whether it would be cheaper for you, Plaintiff corporation, to obtain number one gravel from Frey Sand & Gravel Corp. in Alexander, and truck it to your Peppermint Road Plant, than it would be to obtain it from other sources in the Buffalo area?

A. I believe we did, but in so doing, we had to keep in mind that we would be affecting other products in that same plant and also we had-- in other words, we are affecting the retail of other products besides just the number one stone from this plant. From the Alexander plant.

Q. How do you mean? Why?

A. Well, if we sold all the pea gravel--

Q. Pea gravel is--

A. Number one stone. If we sold all the number one stone, we would be depriving the local area out there of number one stone.

Q. And, would that have an affect on your ability to sell some of the other products out there like number two or concrete sand?

A. I would--I believe it would.

Q. In other words, is it in your experience, do customers for example from Frey Sand & Gravel Corp. want to buy not only number one gravel from you, but also concrete sand and if they can't get both, they're liable to go somewhere else?

A. No, it's not a case of liable to go some place else, they might be--come back and still get it, but they expect to buy all their needs, not just part of their needs from the one source." (H. Frey, 1084-5)

"Q. Well, let me ask you this. What has that got to do with any decision to make use of products from Alexander here in your Peppermint Road Plant?

A. Why should we? That plant runs independent. It was not built to serve Lancaster, it was a separate business and why should we sell into Lancaster and try and cut the price to--cut our price to anybody in that area? We sell what we feel is a fair price in the area, why should we try to sell to ourselves or anybody else in this area or any other area and thereby--for, create a problem that we don't have out there?

Q. You mean out in Alexander?

A. That's right. Should we start a problem like Pine Hill has started with us, and created with us?

Q. Mr. Frey, at any time to your knowledge has the Plaintiff corporation made any kind of a cost analysis to determine what the actual cost of obtaining number two gravel from your Alexander Plant would be, to the Peppermint Road Plant?

A. No, other than looking at the--the apparent list price and leaving it go at that.

Q. All right. Would your answer be the same if I asked it to you--the question, with respect to the concrete sand, the grit?

A. Yes." (H. Frey, 1091-2)

1. Although plaintiffs apparently allege as an essential foundation of their claims that the plaintiffs are unable to compete with defendants because they have no economically feasible source of sand and gravel for the Peppermint Road batcher plant, testimony from plaintiffs' president establishes that plaintiffs have their own sources of sand and gravel supplies in their Alexander pits, that they have and do use some requirements of sand and gravel for both their Peppermint Road batcher plant and their Union Road batcher plant, that the prices charged to Frey Concrete, Inc. by its affiliate (commonly owned) Frey Sand & Gravel, Inc. include a margin of profit in an undisclosed amount to Frey Sand & Gravel, Inc., that plaintiffs are unable to allege that the cost of obtaining sand and gravel from its Alexander pits for use in the Peppermint Road plant is greater than the cost of obtaining sand and gravel from Pine Hill or other suppliers, and that plaintiffs refuse to use their sand and gravel from their Alexander pits for their Peppermint Road batcher plant because they insist on attempting to force Pine Hill to supply plaintiffs

with No. 1 gravel--a prime product in demand--in order to conserve its own gravel for sales to others.

j. Although the complaint purports to allege that defendants have, over the years from 1947 or 1949, acquired ownership or rights to use all or substantially all of the gravel lands in Erie County and the Western New York area, the assertion is patently false. The defendants, either singly or taken together, do not control all or substantially all of the land in this area containing gravel deposits. Plaintiffs' Alexander properties are an example to the contrary; as well as the properties owned and operated by Clarence Sand & Gravel Company. The plaintiffs' president himself admitted in testimony on March 5, 1973 that he knows of the location of gravel lands in Erie County refusing to disclose the locations with the explanation: "Well, some day there may be a reason that I just may want to get them myself." (90)

k. Nor have the plaintiffs in any way been limited or prohibited from themselves acquiring gravel properties in the area. On the contrary, it is apparent from the testimony of Herbert Frey that his father, George Frey (the organizer and initial owner, until his 1968 death, of the plaintiff corporations), was during his lifetime very active in buying and selling gravel properties. The testimony is that this former owner and

chief executive officer of plaintiffs "bought quite a little of the property and sold it to the Pfohls" (16-17; 27-29):

"Q. All right. Mr. Frey, the Alexander operation was put into effect, I think you stated, sometime in 1959 or 1960; is that correct?

A. I think that is about right, sir.

Q. Okay. Right. And when that operation was put into effect, was it primarily put into effect to service and supply your West Seneca Plant?

A. No sir.

Q. All right. Now, can you tell me why you developed the operation out in Alexander?

A. Well, no particular goal was definitely laid out for that operation. I should say this was when my father was very active and he has always dabbled in gravel since I can remember. I mean he had interests in gravel. He was a Teamster actually, the very first job he ever had, he hauled gravel and used to dig it out of the creek and haul it, and there were three of them that did it in the community of Lancaster. He always had some interest in gravel most of his life." (H. Frey, 345-6)

"Q. Was your company, or any company that you or your father were associated with, involved in purchasing and taking options for the purchase of lands that contained gravel or suspected would contain gravel, from 1950 to 1959, other than what we have been talking about?

A. I would have to say yes." (389)

1. The plaintiffs' president has also testified that he, his sister (Mrs. Muck) and his mother owned gravel lands in Lancaster, New York, at Peters Corners Road, attempted to sell it

to Pine Hill, and then sold it to Clarence Sand & Gravel Company (26-7).

m. After the May 17, 1949 alleged contract, George Frey sold one half of gravel premises known as the Duttweiler farm to Regent Sand & Gravel, Inc. (49)

n. The plaintiffs and their owners have had numerous opportunities to purchase gravel properties in the Western New York area over the years with which the complaint is concerned.

o. Since 1970, plaintiffs have refused to purchase their Peppermint Road concrete sand requirements from Pine Hill, electing to purchase sand from other suppliers.

p. Gravel is not an essential ingredient in ready-mixed concrete. Other aggregates such as crushed stone and haydite can be used. Crushed stone is in plentiful supply in the proximate area of plaintiffs' Peppermint Road batcher plant.

q. The plaintiffs' Union Road batcher plant services the Greater Buffalo area in which plaintiffs operate and has obtained its requirements of concrete sand and gravel from sources other than Pine Hill or any of the defendants.

r. During the course of the year 1974, and prior to November 25, 1974, plaintiffs have purchased No. 1 gravel for use in their Peppermint Road batcher plant from General Crushed

Stone Co. and Buffalo Slag Co. (97). Annexed hereto is a statement on behalf of plaintiffs and pursuant to direction of the United States Magistrate setting forth the sources from which plaintiffs obtained grit (concrete sand) and gravel for use at their Peppermint Road plant in the years 1970-1973 (Schedule 1). Plaintiffs have not purchased all of their requirements for concrete sand or gravel for their Peppermint Road batcher plant from Pine Hill.

26. With respect to plaintiffs' operations in the ready-mixed business defendants wish to point out to the Court the following facts:

a. Plaintiffs service the Greater Buffalo area, that is, the City of Buffalo and the towns surrounding it (89, 741).

b. Plaintiffs own three ready-mixed (batcher) plants: at Peppermint Road, in the Town of Lancaster, referred to in Paragraph 8 of the complaint; at the intersection of Peppermint and Pavement Roads in the Town of Lancaster referred to by plaintiffs' president as the "garage plant"; and on Union Road in West Seneca. The Peppermint-Pavement Road (garage) plant is basically unused by plaintiffs, though constructed only some 10 years ago, having been used only one week in 1974, a month or month and one half in either 1972 or 1973 and a week in the other year (38, 1020-5).

c. Both plaintiffs' Peppermint Road and Union Road plants are used by plaintiffs to service the Greater Buffalo area (1045).

d. Since 1970, plaintiffs have purchased 12 additional mixer trucks, 8 rated at 12 cubic yards capacity and 4 at 10 cubic yards, at an approximate cost to plaintiffs of $588,000.00 (1058-61).

e. With respect to commercial ready-mixed jobs, plaintiffs determine the price to be charged by them for ready-mixed sold on a job-by-job basis, not on the basis of a price list applicable to all sales of similar products. In obtaining sales of ready-mixed plaintiffs give price reductions or discounts which are not based on any standard formula or method of determining the amount of discount on the basis of such factors as volume or distance of delivery (946-58).

f. With respect to commercial ready-mixed jobs, plaintiffs mode of operation is to make a bid for the job (to supply the ready-mixed concrete) and then to reduce the price to beat the competition. As Mrs. Muck, whose family owns half the stock of plaintiff corporations and who is secretary-treasurer, explained in testimony:

"Q. And, then has it been the practice of the--of the Plaintiff corporation to make such price reductions and to make such other arrangements to reduce the cost to the purchaser as the Plaintiff corporation feels is necessary to get the job?

A. Repeat it.

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: I'd like it read over, please.

(Whereupon, the above-requested was then read back by the reporter.)

THE WITNESS: When our men go in after--let me start that over again. After a job has been let with a specific contractor, our men will call on this contractor. They never tell us exactly who we're bidding against, we know many times it's our competitor, Pine Hill, we're not positive exactly what they say, if you give us--I don't want to give a specific example because it wouldn't be all true, but if you can get your prices down within so much you can have the job. And many times these people will give us a job, maybe a few cents more than our competition is because they do prefer to deal with us.

BY MR. FUZAK:

Q. Fine.

A. And, I know we have a good service and we have quality material and our customers like our drivers and we try to accomodate them." (Mrs. L. Muck, 963-4)

g. Plaintiffs' sales manager, A. Douglas Burg, also has testified:

"Q. Now, does the Plaintiff corporation maintain any kind of schedule of discounts depending upon the quantity of the sale involved and the distance to be traveled with that quantity?

A. Each job is taken as an individual case in the commercial field or the individual job field.

Q. Let me ask you on that so the record is clear, when you refer to commercial field, what do you mean by commercial?

A. Well, this would be anything where a general contractor would be bid in the form of schools or garages or something that usually other than housework, or garage work would be considered commercial business.

Q. All right. And, your answer then, anything that is other than residential work, including houses and/or garages would be regarded as commercial work?

A. Yes, I would say so." (A. D. Burg, 745-6)

"Q. Well, am I correct then, that what you're saying is that while the company does not have a fixed schedule of discounts, dependent upon quantity and/or distance, it handles the giving of such discounts on a case by case, customer by customer, basis, is that right?"

* * *

"THE WITNESS: That is correct.

BY MR. FUZAK:

Q. All right. When the company gives such discounts or lower prices than its list prices, it does so I understand on the basis of each particular case as it comes up, is that right?

A. That is true, each case is discussed individually.

Q. And, who makes those decisions as to what discount will or will not be given from the list price to a particular customer at a particular time?

A. Mr. Frey and Mrs. Muck." (747-8)

h. In addition to granting outright price discounts on a customer-by-customer and job-by-job basis, plaintiffs have also employed other means of reducing the final cost of ready-mixed sold to certain customers (484-6), such as waiving mixer truck waiting time charges (753-61), waiving minimum trucking charges (767-70), and allowance of a "prompt payment discount" after expiration of the maximum payment period (38). Sales manager Burg testified:

"Q. In other words, it's true is it not that there have been occasions during this period of time, 1968 to date, when your company, the Plaintiff corporation has granted price discounts from the list price without having first been told by the customer that the competition is giving them a discounted price?

A. The market today is such that the commercial people are not buying any concrete to speak of at list price, we're living in a--I'd say a price situation that is four years or so behind the times. In other wirds we have prices on the market that do not truly reflect what our costs are.

Q. I found that very interesting, but would you answer my question however, the one I asked you?

MAGISTRATE MAXWELL: Maybe you could read it back.

(Whereupon, the above-requested testimony was then read back by the reporter.)

THE WITNESS: It's true." (A. D. Burg, 776-7)

"Q. Well, a minute ago the last question you said that the list price has not been in effect with respect to commercial busiress since at least 1968 or 1969, is that correct?

A. I'd say that is basically true.

Q. And, by the list price, you're talking about the Plaintiff corporation's list price, your list price?

A. That is correct.

Q. So are you saying then that you take each one of these commercial jobs that you propose to provide Ready-Mixed Concrete for and you handle it on a separate job by job basis and make the best deal that you can in effect?

A. This is true on commercial work." (A. D. Burg, 811-12)

i. Plaintiffs have over the years and to the present pursued a policy of what their president characterized as "finagling", or using "tricks" or gimmicks" to obtain jobs (sales of ready-mixed concrete) from their competitors, this method of doing business having been originated in the plaintiff corporations by their founder, owner and chief executive officer until his death in 1968, George C. Frey (269, 473-86, 810-12, 743-77).

j. Plaintiffs are in active and successful competition with Pine Hill and other ready-mixed suppliers for sales in the Greater Buffalo area.

k. In purchasing grave .rom suppliers other than Pine Hill, plaintiffs obtain discounts from the suppliers' list prices, other than for prompt payment.

l. Plaintiffs have over the years purchased concrete sand and gravel from Pine Hill ostensibly to satisfy their requirements for production of ready-mixed concrete at their Peppermint Road plant, but have not used all of those materials for that purpose, and have instead resold some of those materials to others.

WHEREFORE, the defendants, and each of them, request that the Court enter an Order dismissing this action on the grounds that the Court has jurisdiction neither over the subject matter of the action nor over the parties, and that defendants have the costs and disbursements of the action.

/s/ Norman M. Moran

Subscribed and sworn to
before me this 14th day
of January, 1975.

/s/ Victor T. Fugit

76

Affidavit of Norman M. Moran.

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LAW OFFICES
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BUFFALO, NEW YORK 14203

November 27, 1974

Victor T. Fuzak, Esq.
Hodgson, Russ, Andrews, Woods & Goodyear
1800 One M & T Plaza
Buffalo, New York 14203

Re: Frey vs. Pine Hill

Dear Mr. Fuzak:

I herewith furnish you with the requested information concerning the sources of grit and gravel used at the Frey batch plant at Peppermint and Pavement Roads:

1970:	Batavia Sand & Gravel Franklinville (Buffalo Slag) Machias (General Crushed Stone) Dan Gernatt Frey Sand & Gravel (8/70)
1971 & 1972:	Machias (General Crushed Stone) Pine Hill (7/71) Frey Sand & Gravel
1973:	Franklinville (Buffalo Slag) Pine Hill

Very truly yours

ARNOLD WEISS

AW:T
CC: Hon. Edmund F. Maxwell
U. S. Magistrate

SCHEDULE 1

Affidavit of Victor T. Fuzak.

RECEIVED
1975
POST MARKED Feb 4PM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY and LOIS MUCK as co-executors
of the Estate of GEORGE C. FREY, Deceased

Plaintiffs

-vs-

PINE HILL CONCRETE MIX CORP.,
REGENT SAND & GRAVEL CORP.,
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC.,
a dissolved corporation, and
PFOHL BROTHERS, INC.

Defendants

AFFIDAVIT

CIVIL 1970-277

STATE OF NEW YORK)
: SS.
COUNTY OF ERIE)

VICTOR T. FUZAK, being duly sworn, deposes and says:

1. I am a member of the firm of Hodgson, Russ, Andrews, Woods & Goodyear, retained by the defendants in October, 1974, to undertake the representation of the defendants in this matter in view of the death of defendants' previous attorney, Charles J. McDonough, Esq. I am familiar with the facts and the proceedings heretofore had in this action. This

affidavit is filed in support of a motion by defendants for dismissal of the complaint on the grounds that: The complaint fails to state a claim upon which relief can be granted; the Court does not have jurisdiction over the parties or over the subject matter of this action; a variety of plaintiffs' presumed claims are barred by the Statute of Limitations; and that the defendants are entitled to summary judgment dismissing the complaint, on the basis of pleadings, affidavits and testimony filed with the Court.

THE COMPLAINT DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED:

2. Since it is clear that any claims plaintiffs may attempt to assert with respect to the conduct of defendants prior to four years in advance of the commencement of this action in June, 1974, are barred by the Statute of Limitations (Title 15, USCA, Section 15b), it is first necessary, in analyzing the complaint for determination of whether a cause of action is stated, to delete from consideration as part of any alleged claim, those allegations relating to conduct prior to June, 1966. Plaintiffs are barred by the Statute of Limitations from claiming any wrong or damages with respect to the following allegations of their complaint:

Paragraph 17. Plaintiffs allege that prior to in or about 1949 and 1957, " . . . defendants Pfohls were engaged in the gravel business in Erie County and had control of most or substantially all of the gravel sources, supplies, facilities and plants in proximity to plaintiffs' ready-mixed plant and facilities, excepting that owned by plaintiffs and defendants prior to in or about 1949 and 1957 respectively". Even assuming arguendo the truth of this allegation--which is denied by the defendants--the existence of that claimed condition 21 years and 13 years before the commencement of this action cannot form the basis for any claimed violation of the federal antitrust statutes.

Paragraph 18. The plaintiffs allege that on May 17, 1949--21 years before the commencement of this action--the plaintiffs sold to the defendants Pfohls, 100 acres of property in the Town of Lancaster including washing, classifying and storage facilities and plant located on that property, but excluding plaintiffs' ready-mixed plant. The plaintiffs are barred from raising any question, or from making any complaint concerning that transaction, concluded as it was 21 years before the filing of this action.

Paragraph 23. Plaintiffs allege that on or about August 1, 1957 that the defendants Kahle and Pine Hill purchased all of the stock (common stock) of Pfohl Brothers, Inc. as well

as all or most of the gravel properties, interests and business of the individual defendants Pfohls, and that the defendants Kahle and Pine Hill dissolved Pfohl Brothers, Inc. on August 26, 1957. Since this action was not filed until 13 years after the transactions to which reference is made, the plaintiffs are barred from attempting to assert any claims with reference to those transactions.

Paragraph 24. Plaintiffs allege in this paragraph that by reason of the purchase by Pine Hill of all of the common stock of Pfohl Brothers, Inc. " . . . plaintiffs' said former premises became subject to reverter and/or reverted to plaintiffs by reason of defendants' failure to comply with the conditions thereof, and said dissolution of Pfohl Brothers without any distribution of said premises as an asset or without any assumption of said obligations to plaintiffs." Aside from the complete insubstantiality of any claim of "reverter", and the incomprehensibility of the allegation itself, is the fact that once again reference is being made to transactions which occurred in 1957, some 13 years prior to the filing of this action. Moreover, as appears from the contract between George C. Frey and Pfohl Brothers, Inc. dated May 17, 1949, a copy of which is annexed as Schedule 1 to this affidavit, there was no prohibition in that contract against the assignment of the contract or against the sale by Pfohl Brothers, Inc. of its business or the capital stock of that corporation.

3. The complaint purports to set forth the facts upon which the claims of violation of the federal antitrust statutes are based in Paragraphs 22 through 30, under the heading "THE WRONGFUL ACTIONS AND CONSPIRACY".

Paragraph 22 contains conclusory allegations with no specification of facts in support of the stated conclusions of violations of Sections 1 and 2 of the Sherman Act and Sections 1 and 4 of the Clayton Act. Paragraphs 23 and 24 cannot, by reason of the Statutes of Limitations, as noted above, form the basis for any claim of wrongdoing, and must be disregarded in any context.

In Paragraph 25 plaintiffs make the curious allegation that the sale of the property described in Paragraph 23, which the plaintiffs allege was consummated and effected on or about August 1, 1957, was evidenced by a deed which was not executed or recorded until on or about May 1, 1969. Aside from the obvious irrelevance of any such allegation and the absence of any basis upon which to premise a claim even assuming the truth of the allegation, the allegation is totally false. The deed to which reference is made, a copy of which is annexed hereto as Schedule 2, was executed on August 31, 1957. It was not recorded until May 1, 1969, a fact which has nothing to do with any relationships between the plaintiffs and the defendants or

any issues or possible issues in this action. Paragraphs 25 and 26 of the complaint lend nothing to the statement of a cause of action.

The allegations of fact presumably intended to support a cause of action for violation of the federal antitrust statutes appear in Paragraph 27 of the complaint and can be briefly summarized as follows:

(a) That commencing on or about February 6, 1968 the defendants dishonored the contract of May 17, 1949 (Schedule 1 hereto);

(b) That defendants unilaterally raised the price of gravel to plaintiffs to a price in excess of that stipulated in the contract (that is, to Pine Hill's then current list price less 20% and 2% discounts);

(c) That contrary to the contract the defendants refused to allow the plaintiffs the discounts set forth in the contract;

(d) That contrary to the contract the defendants refused to deliver gravel to plaintiffs' plant without charge;

(e) That contrary to the contract the defendants refused to sell gravel to the plaintiffs except at defendants' regular list prices pursuant to which it made sales to others in the area;

(f) That contrary to the contract the defendants closed down the washing plant on the Peppermint Road premises;

(g) That contrary to the contract the defendants refused to sell or deliver gravel to the plaintiffs on credit;

(h) That defendants recorded a deed dated August 31, 1957 to the Peppermint Road premises from Pfohl Brothers to defendant Regent Sand & Gravel on February 11, 1969;

(i) That defendants instituted an action in the Supreme Court of the County of Erie against plaintiffs to recover amounts alleged to be owing from plaintiffs to defendants;

(j) That defendants continued to compete with the plaintiffs for customers and business in the area;

(k) That the defendants made attempts to purchase the plaintiffs' business for less than the value thereof;

(l) That the defendants "otherwise monopolized, restrained and injured the plaintiffs and their business".

The above constitute the recitations of alleged fact upon which the plaintiffs base their claims that the defendants have violated both the Sherman Act and the Clayton Act. The defendants submit that even if the truth of all of the factual, as distinguished from conclusory and legal allegations, of the

complaint are assumed to be true for purposes of testing the sufficiency of the complaint, there is no statement of a cause of action for violation of any of the federal antitrust statutes.

What plaintiffs have alleged is a claimed cause of action for breach of contract. Plaintiffs have alleged no facts in support of the conclusory allegations of monopolization or restraint of trade.

4. As to alleged violation of the Sherman Act, the complaint is deficient in that:

(a) There is no statement of fact specifying the relevant market as to which conclusory claims of monopolization or attempted monopoly allegedly relate.

(b) There is no statement of fact as to the proportion of the relevant market which it is claimed the defendants control.

(c) There is no statement of the facts which it is claimed support the conclusory allegations of conspiracy, contract, plan, scheme, combination, agreement or arrangement on the part of the defendants; and no allegations whatsoever specifying the claimed actions of each of the defendants in the alleged conspiracy, contract, plan, scheme, combination, agreement or arrangement.

(d) There is no statement of fact in support of the wholly conclusory allegation that the defendants are guilty of an unlawful monopolization or restraint of trade and commerce in the "gravel and ready-mixed business"--no statement of fact as to the nature of the interstate commerce allegedly affected; of the nature or extent, if any, of the interstate commerce in which it is claimed plaintiffs and defendants are engaged; of the extent to which it is claimed defendants alleged conduct has effected a restraint on that interstate commerce; or of the alleged factual consequences of the claimed improper conduct.

(e) There is no statement of fact showing any actual or potential detriment to the public from the alleged attempt to create a monopoly, or the claimed actual monopoly, or from the conclusorily stated claim of restraint of interstate commerce.

(f) There is no statement of facts to show that the defendants have extraordinary control of an appreciable part of interstate commerce.

(g) There are no facts pleaded from which any conclusion could be made that the defendants attempt to obtain an extraordinary control of an appreciable part of interstate commerce, or that their alleged conduct could lead to such a result.

(h) No facts are alleged upon which the conclusion could rest that the defendants, whether singly or in concert, have engaged in or are engaging in conduct which constitutes an unreasonable restraint of trade in or affecting interstate commerce.

(i) There are no allegations in the complaint of price control or manipulation by defendants of gravel and/or ready-mixed concrete which affects or has affected interstate commerce to the detriment of the public.

(j) There are no allegations in the complaint setting forth facts which, if proven, would establish that the alleged conduct of defendants has had an adverse effect on the price of ready-mixed concrete and/or gravel to the general public. On the contrary, the essence of the claims stated by plaintiffs is that defendant Pine Hill has allegedly refused to continue to sell gravel and concrete sand to plaintiffs at a preferred discount price from the price charged by Pine Hill to competitors of plaintiffs (Paragraphs 19 and 27).

(k) There are no factual allegations--either as to the broadly referred to "gravel business" or "ready-mixed business"--as to the quantities of these products involved in the claimed relevant market (which is itself not defined), the proportions of those quantities as to which it is claimed

defendants conduct relates, the proportions of the total interstate commerce concerning which it is alleged defendants have effected a monopoly or are attempting to do so.

(1) There are no factual--or indeed even conclusory--allegations of an attempt to effect a change, or of an actual change in the flow of gravel or ready-mixed concrete in or affecting interstate commerce.

In short, there are no facts pleaded which if proven would establish any of the required elements of monopolization, attempted monopolization, or unreasonable and substantial restraint of interstate commerce. There are no facts pleaded, which, if proven, would establish that any of the parties to this action are in any way engaged in interstate commerce or in business having a substantial effect on interstate commerce.

5. In sum, if all of the ultimate facts pleaded by plaintiffs--as distinguished from the litany of conclusory legal accusations--were to be established by plaintiffs upon a trial, there would and could be no showing of any violation of the Sherman Act. None of the essentials of any such violation have been factually pleaded or could be proved. As the matter now stands, neither the defendants nor the Court are advised as to the facts allegedly supporting the conclusory accusations in the complaint. What the complaint accuses is that defendants

are competing with plaintiffs and that defendants have dishonored a contract giving plaintiffs price treatment preferential to that of other customers of defendants. We challenge plaintiffs to specify the facts recited in the complaint which allegedly give this Court jurisdiction and which, if proven, would require entry of judgment against defendants for violation of any federal antitrust law.

6. It is apparent that plaintiffs have prepared and filed this complaint, and commenced this action, on the erroneous premise that adherence to some theory of "notice pleading" requiring only the allegation of legal conclusions is proper in an antitrust action. The contrary is true. Antitrust actions are major undertakings for the Courts and for those accused of illegality. They properly involve important questions of jurisdiction based on interstate commerce, the determination of the relevant interstate market involved, the ascertainment of relative market control, the proof of special conduct affecting illegal price restraint, monopolization and so on. Despite the clear requirements of the decisions that the pleading of conclusions is insufficient, particularly in antitrust actions, and that the factual elements of the claimed wrongs must be pleaded clearly, concisely, particularly and factually, plaintiffs' approach in this action is and has been that so-called "notice pleading" is sufficient.

7. As to the alleged violation of the Clayton Act, the complaint not only does not state any facts which would constitute a violation of that act, but it does not specify the particular provisions of that act which plaintiffs claim have been violated. The complaint is deficient for the reasons stated above and for the additional reasons that:

(a) The complaint alleges the conclusion that defendants have violated Sections 1 and 4 of the Clayton Act (Title 15, USCA, Sections 12 and 15). Section 12 defines terms used in the act. Section 15 allows private civil suits for injury by reason of conduct forbidden in the antitrust laws. Neither section proscribes or declares illegal any specific conduct. Accordingly, even on the unacceptable "notice pleading" approach, the complaint does not specify even the provisions of the act which it is claimed defendants have violated.

(b) There are no allegations of fact that either the plaintiffs or defendants have at any time been involved in sales of either gravel or ready-mixed concrete across state lines, that is, in interstate commerce, or in sales of gravel or ready-mixed concrete which are incorporated into products sold in interstate commerce.

(c) There are no allegations--factual or conclusory--that any of defendants have discriminated in price

to the detriment of plaintiffs or with the result of substantially lessening competition or tending to create a monopoly in violation of Section 13, Title 15. On the contrary, plaintiffs essential complaint is that defendants allegedly refused to price discriminate in their favor. There are no factual allegations in support of any claim of violation of Sections 13 a, b and c, 14 or 18.

(d) There is no allegation of an acquisition by one corporation of the stock of another in violation of Section 18. The sole reference to acquisition of the stock of a corporation relates to the 1957 acquisition by Pine Hill of the stock of Pfohl Brothers, Inc. That transaction may not be alleged as a violation of Section 18 since it occurred more than 13 years before the commencement of this action, and claims relating to it are barred by Section 15 b. In addition, irrespective of the bar of the Statute of Limitations and the absence of jurisdiction, the complaint does not set forth facts which if proved would establish that the effect of the acquisition was substantially to lessen competition or to tend to create a monopoly in interstate commerce.

In sum, even if all of the allegations of fact in the complaint were proven, no violation of any section of the Clayton Act would be established.

THE COURT DOES NOT HAVE JURISDICTION OVER THE PARTIES OR THE SUBJECT MATTER:

8. The affidavit of Norman M. Moran, the Comptroller of Pine Hill, sets forth facts which establish that none of the parties are engaged in interstate commerce and that none of the claimed activities have any direct or substantial effect on interstate commerce.

WHEREFORE, defendants request that an Order be entered granting the relief sought in the Notice of Motion.

Victor T. Fuzak

Subscribed and sworn to
before me this 17 day
of January, 1975.

[illegible]

DIANE L. [illegible]
Notary [illegible] New York
[illegible]
My Commission expires March 30, 1976

Affidavit of Victor T. Fuzak.

AGREEMENT, made this 17th day of May, 1949, by and between ADOLPH C. FREY, residing in the Town of Lancaster, New York, whose office and post office address is William Street, R.F.D. #2, Lancaster, New York, party of the first part, and FREY BROS. INC., a business corporation organized and existing under the laws of the State of New York, and having its principal office at Pavilion Road, in the Town of Cheektowaga, New York, party of the Second part;

WHEREAS, ADOLPH C. FREY is the owner of the following described real property on which there are deposits of sand, grit and gravel, suitable for commercial use, which FREY BROS.,INC., desire to purchase:

ALL THAT TRACT OR PARCEL OF LAND, situate in the Town of Lancaster, County of Erie and State of New York, being part of Farm Lots Numbers Four (4) and Six (6), in the Fifth (5th) Section, Township Eleven (11) and Range Six (6), according to the Holland Land Company's Survey, bounded and described as follows:

BEGINNING at a point in the northerly line of Lot Number Six (6), which is also the center line of Peppermint Road, distant easterly six hundred and two (602) feet from the northwest corner of said Farm Lot Number (6); running thence southwardly parallel with the westerly line of said Farm Lot Number Six (6), one thousand seven hundred and seven and thirty-four hundredths (1707.34) feet; running thence easterly along the southerly line of lands conveyed by the Buffalo Sand Co. Inc. to the party of the first part by deed dated April 27, 1949 and recorded in the Erie County Clerk's Office on that day in Liber 4034 of Deeds at page 443, two thousand thirty-nine and thirty-two hundredths (2039.32) feet to a stake situated on the easterly line of Lot Number Four (4), distant southerly one thousand five hundred forty-five and seventy-two hundredths(1545.72) feet from the northeasterly corner of said lot; thence northerly along the easterly line of said Lot Number Four (4), one thousand five hundred forty-five and seventy-two hundredths (1545.72) feet to the northeast corner of said lot, said point being also in the center line of Peppermint Road; thence westerly along the northerly line of said Lot Number Four (4), one thousand two hundred twenty-five and sixty-two hundredths (1225.62) feet; thence southerly at right angles, one hundred thirty-two (132) feet; thence westerly at right angles, eighty-two and five tenths (82.5) feet; thence northerly at right angles, one hundred thirty-two (132) feet to the northerly line of said Lot Number Four (4); thence westerly along the northerly line of Lots Numbers Four (4) and Six (6), six hundred twenty-two and fifty-one hundredths (622.51) feet to the place of beginning, containing seventy-five and sixty hundredths (75.60) acres, be the same more or less.

SCHEDULE 1

Affidavit of Victor T. Fuzak.

SUBJECT, however, to a certain oil and gas lease ordinarily made, executed and delivered by Frank J. Tell and Alma A. Tell, his wife, to Hopes and Lancaster Light, Power and Conduit Company, dated August 28, 1925, and recorded in the Erie County Clerk's Office on September 3, 1925, in Liber 1947 of Deeds at page 23, on all recitals and modifications thereof.

SUBJECT also to a certain right of way given by Buffalo Crushed Stone Co., Inc., to New York State Electric & Gas Corporation, dated February 15, [illegible] recorded in the Erie County Clerk's Office on June 24, 1946, in Liber 3017 of Deeds at page 310.

SUBJECT also to the rights of Franklin J. Tell and Alma A. Tell, his wife, as tenants of said premises to occupy the same until April 1, 1950.

and

WHEREAS, Grantee herein is engaged in the business of preparing, selling and delivering ready-mixed batches of concrete for use in construction projects and has erected upon the said premises, equipped, maintained and operates a batcher plant at or near the aforesaid deposit of sand, grit and gravel, and has heretofore purchased washed and screened sand, grit and gravel secured from the premises hereinafter described for use in manufacturing batches of concrete at premises, and said party of the second part is desirous of purchasing all of the sand, grit and gravel from the premises upon which the batcher plant of said Victor T. Fuzak is located, and it is desired by Victor T. Fuzak to return the use of the batcher plant and to acquire sand, grit and gravel for the continuance of its operation,

NOW, THEREFORE, in consideration of the premises and the covenants, terms and conditions hereinafter mentioned, the above named parties have agreed, and do hereby covenant and agree as follows:

1. PARTY OF THE FIRST PART hereby grants unto the said party of the second part, for the rental of the royalties (hereinafter reserved, and the other considerations hereinafter expressed, all of that part of the premises shown on the survey annexed hereto and marked "Exhibit A", including all the appurtenances thereto.

4. The entire cost of the equipment and maintenance of a batcher plant [illegible] and premises and of its machinery, tools, scales, equipment, water supply, cables, retaining walls, foundations, driveways and other ways, access and other relations thereto is to be borne and paid by Grace C. Hay, exclusively, without contribution from Pfohl Bros. Inc.

5. All risk of loss to said batcher plant or to the equipment, or its appurtenances, or persons, or to the public, resulting from fire, explosion, lightning, [illegible] act, or otherwise, shall be assumed and borne by Grace C. Hay, except damage resulting from cave-ins, if any, that shall be caused by excavations made by Pfohl Bros. Inc., in close proximity to the structures or driveways of said plant.

6. All [illegible] buildings and machinery which shall be erected or installed by Grace C. Hay upon the land owned by Pfohl Bros. Inc. under this agreement shall be and remain the property of Pfohl Bros. Inc., subject to the conditions hereinafter stated, but all driveways, retaining walls, foundations and well installed thereto by Grace C. Hay shall become and remain the property of Pfohl Bros. Inc., exclusively, without obligation or contribution on its part, except as hereinafter set forth.

Grace C. Hay shall, during the term of this contract be solely responsible for the safety and stability of retaining walls, foundations, walls and drive ways and all other improvements placed by her upon the premises of Pfohl Bros. Inc., for use in connection with the operation of the batcher plant, but Pfohl Bros. Inc. shall not excavate sand, grit or gravel in such close proximity to said plant as to endanger the foundations or driveways thereof.

7. [illegible] shall be liable for any damage to the structures, constituting his batcher plant, placed on the

lands purchased by PECAL Bros. INC., to be separately determined and fixed by the Board of Assessors, or other proper municipal board, or officer, of the Town of Lancaster, and shall promptly pay all taxes and assessments, based on the assessed valuation of such batcher plant, that shall be levied against said batcher plant, or against the portion of the lands purchased by PECAL Bros. INC occupied by the batcher plant site, during the term of this agreement.

6. Albert C. Ball shall use due care and caution in and about the operation of the concrete batcher plant contemplated under this contract, and shall not cause or permit any loss, damage, or nuisance, in or about the operation of said plant and shall, at his sole expense, hold it and defend PECAL Bros. INC. and its officers, agents and servants, free and against any and all claims, demands, actions and suits that may be asserted or brought against said PECAL Bros. INC., or against its officers, agents or servants, as a result of the operation of the aforesaid batcher plant by Albert C. Ball on the lands purchased by PECAL Bros. INC., and said Albert C. Ball shall, at his sole expense, carry and maintain, during the term of this contract, full and adequate workmen's compensation insurance, covering all of his employees and shall also carry public liability and boiler explosion insurance with limits of $50,000.00 to $100,000.00, with solvent insurance carriers, duly licensed under the laws of the State of New York, for the protection of himself and PECAL Bros. INC., and shall deliver to PECAL Bros.INC., on request, certificates issued by such insurance carriers, evidencing such insurance to be in full force and effect.

7. 6. No other concrete batcher plant may be erected or operated on the premises purchased by PECAL Bros. INC.,

located at the junction of Pavement and Peppermint Roads, in the Town of Lancaster, New York, or any other property which PECHL BROS. INC. now or hereafter may own, lease or operate, while a batcher plant is operated by GEORGE C. FREY or his heirs, legal representatives, successors or assigns, under this agreement. GEORGE C. FREY, his heirs, legal representatives, successors or assigns, shall not operate a batcher plant or process sand and gravel within the County of Erie while this contract is in effect.

In the event that GEORGE C. FREY shall acquire any other property on which there may be gravel deposits, and in the event that he shall decide to cause the same to be made available for the purpose of processing sand, grit or gravel, he hereby agrees to give PECHL BROS. INC. the first chance to operate the same upon terms to be negotiated and agreed upon between the parties. The said PECHL BROS. INC. shall be given thirty (30) days' written notice of the availability of such gravel deposits. All stripping of overburden shall be done by PECHL BROS. INC. Sand, grit and gravel shall be sold at not to exceed ten cents (10¢) per ton by said GEORGE C. FREY to PECHL BROS. INC. In the event that PECHL BROS. INC. fails to exercise such option, the property in question may be sold to any other person, firm or corporation.

In the event that GEORGE C. FREY shall acquire the property situated on the west side of Pavement Road, and directly across from the Weil Farm, then he agrees to give to PECHL BROS. INC. a right-of-way forty (40) feet in width along the southerly line of the premises retained by GEORGE C. FREY from the Weil Farm, said right-of-way to run until the pit is no longer operated commercially.

8. PECHL BROS. INC. shall make, promulgate and enforce rules requiring all of its employees to keep off the premises hereby leased to GEORGE C. FREY, except while on the business of

PFOHL BROS. INC.

9. GEORGE C. FREY shall make, promulgate and enforce rules requiring all of his employees to keep off the premises purchased by PFOHL BROS. INC. not covered by the lease to GEORGE C. FREY, except while on the business of GEORGE C. FREY.

10. In the event that GEORGE C. FREY, his heirs at la legal representatives, successors or assigns, shall decide to discontinue or sell the ready mix concrete business or batcher plant under this agreement and to sell the portable portions thereof, and the machinery, equipment, trucks and appurtenances used in connection with the operation thereof, notice in writing to that effect, stating the price, terms and conditions upon which such property will be sold and conveyed shall be given to PFOHL BROS. INC., by registered mail, and the said PFOHL BROS. INC. shall have thirty (30) days from the receipt of such notice in which to purchase said batcher plant, together with the machinery, equipment and appurtenances thereof, and the trucks used in and about the operation thereof, upon the terms and conditions and for the price stated in such written notice.

Modified 2-2-49

If PFOHL BROS. INC. shall not exercise the option to purchase said plant and its equipment, etc., as hereinbefore provided within thirty (30) days from the receipt of such written notice, GEORGE C. FREY, his heirs, legal representatives, successors or assigns, may offer the said plant and its equipment for sale to the public. However, if said plant is not operated for a period of at least one (1) year without a sufficient and proper reason being shown to the satisfaction of PFOHL BROS. INC., said PFOHL BROS. INC. may, by registered mail addressed to GEORGE C. FREY or his legal representatives, at "William Street R.F.D. #2, Lancaster, New York", or to his successors or assigns at their addresses, order the plant removed in six (6) months if no just cause or reason can be given for failing to operate the same. If such plant shall be removed, however, the retaining

walls, foundations and wells thereof shall not be disturbed. However, said GEORGE C. FREY may remove the roadway or ramp fro the retaining wall to the plant, and any steel beams which may be welded to the retaining wall may be likewise removed.

11. The said PFOHL BROS. INC. agree to furnish to GEORGE C. FREY for the use in his batcher plant located o on th premises herein described, sand grit and gravel as he may requi from any pit or property which they now or hereafter own, lease or operate located in the County of Erie, at the pit price delivered in the bins at the batcher plant herein described, le discounts hereinafter mentioned.

In the event that said GEORGE C. FREY desires to aban the batcher plant facilities herein referred to, PFOHL BROS. IN will cooperate to the fullest extent and, if necessary, at the option of the said GEORGE C. FREY, include a new location at an other pit or washing plant owned, leased or operated by said PFOHL BROS. INC. However, any new crushed stone batcher plant at a s. e on any premises now or hereafter owned, leased or ope ated by PFOHL BROS. INC. other than at Pavement and Peppermint Roads, Town of Lancaster, New York, shall be covered by a new agreement between the parties.

12. This lease shall inure to the benefit of the hei representatives, administrators, executors, successors and assigns of the said GEORGE C. FREY, and may be assigned by him then, or sublet in whole or in part at any time during the term thereof or the term of any renewal thereof.

13. PFOHL BROS. INC. has agreed and does hereby agre to sell and deliver, during the term of this contract, to GEORG C. FREY, and to his heirs at law, legal representatives, succes sors and assigns, at the batcher plant on the premises pur- hased by PFOHL BROS. INC., at Pavement and Peppermint Roads, in the Town of Lancaster, or such other plant or plants as may replace it, washed and screened concrete sand, grit and gravel from the said pits. Said sand and grit, referred to in this

agreement, shall pass through a screen with a one-quarter inch mesh, or opening, and the gravel shall be of two sizes, one of which sizes shall pass through a screen with a mesh or opening one-half inch in size and shall be retained on a screen with quarter inch mesh or openings, and the other size shall pass through a screen with a mesh or opening one and one-half inches in size and be retained on a screen having a mesh or opening one-half inch in size, for the prices and upon the terms which shall be agreed to annually by the parties hereto and set out on a written schedule signed by both parties to this agreement.

The said PFOHL BROS. INC. agree to furnish to GEORGE C. FREY, his heirs at law, legal representatives, successors and assigns, such grades of sand, grit and gravel as he may require for the operation of his business.

Exhaustion of suitable material for concrete mix at all pits owned, leased or operated by PFOHL BROS. INC. shall terminate this contract. Exhaustion shall mean lack of 3 mil grit and gravel in commercial quantities after suitable and through exploration of the properties.

14. GEORGE C. FREY, in consideration of the granting of the privilege to operate a ready mix batcher plant on the premises purchased by PFOHL BROS. INC., shall use sand, grit and gravel exclusively, in preparing and manufacturing his concrete batches, except as herein otherwise provided.

If, however, GEORGE C. FREY, or his heirs at law, legal representatives, successors and assigns shall obtain an order for concrete aggregate in which crushed stone, sand and grits are the component parts, GEORGE C. FREY may purchase crushed stone, sand and grits elsewhere and use the same in his concrete aggregate.

15. PFOHL BROS. INC. shall keep the batcher bins of GEORGE C. FREY'S batcher plant filled with sand, grit and gravel as may be required from its pits at all times during the term of

this contract, subject to the conditions and limitations expressed therein. PFOHL BROS. INC. shall keep a stock pile of approximately 7500 tons of material on hand for use in the batcher plant of GEORGE C. FREY.

It is understood and agreed that PFOHL BROS. INC. shall not be liable for any failure, loss, or damage caused by, or arising out of, fires, strikes, flood, war, public disorder, lawless actions, rioting, epidemics, cave-ins or causes beyond its control. While PFOHL BROS. INC. is unable to deliver sand or gravel because of any of said causes, however, GEORGE C. FREY may procure sand, grit and gravel elsewhere for use in mixing his aggregate.

16. All prices fixed under this contract include the cost of delivery of sand, grit and gravel.

17. Prices for sand, grit and gravel to be furnished by PFOHL BROS. INC. to GEORGE C. FREY and purchased by GEORGE C. FREY hereunder, shall be adjusted and fixed on a separate written schedule by mutual agreement once each year as of April 1st during the term of this contract and shall remain in effect for a period of one (1) year thereafter, unless modified in writing by mutual agreement.

Prices are to be prevailing pit prices, less twenty per cent (20%). Two per cent (2%) discount will be allowed if bills for previous month are paid on or before the 10th day of the following month.

If any party to this contract shall desire that a change or revision be made in the prices of sand, grit or gravel to be sold and delivered under this agreement effective on and after the 1st day of the following April, such party shall give written notice by registered mail of his request for such change of prices, at least sixty (60) days prior to such first day of the following April. Changes or revisions can only be made to conform with prevailing pit prices.

18. This contract shall be binding in all respects on the successors and assigns of PFOHL BROS. INC.

19. This contract shall become effective on June 1, 1949, or at such later time as title to the premises may pass to PFOHL BROS. INC., and shall continue for a term of fifteen (15) years unless sooner terminated by mutual consent, with the privilege reserved to GEORGE C. FREY to renew the said lease upon the same terms, by notice in writing of his option to do so by registered mail addressed to PFOHL BROS. INC., at Pfohl Road, Cheektowaga, New York, or to their successors and assigns, not less than ninety (90) days prior to the termination of the fifteen (15) years provided herein.

Modified 12-31-49

IN WITNESS WHEREOF, the parties have caused this agreement to be executed by GEORGE C. FREY under his hand and seal, and by PFOHL BROS. INC., under the hand of its President, thereunto duly authorized, and its corporate seal, the day and year hereinbefore first written.

GEORGE C. FREY (L.S.)
George C. Frey

PFOHL BROS. INC.
By:

(SEAL)

PAUL M. PFOHL
Paul M. Pfohl, President

STATE OF NEW YORK)
COUNTY OF ERIE) SS
VILLAGE OF DEPEW)

On this 17th day of May, 1949, before me, the subscriber, personally came GEORGE C. FREY, to me personally known, and known to be to be the same person described in and who executed the within instrument, and he duly acknowledged to me that he executed the same.

HAROLD P. KELLY
Harold P. Kelly
Notary Public
In and for Erie County, N.Y.
My Commission expires March, 5

Affidavit of Victor T. Fuzak.

STATE OF NEW YORK)
COUNTY OF ERIE) SS.
VILLAGE OF LEPPER)

On this 17th day of May, 1949, before me personally came PAUL L. PFOHL, to me personally known and, being by me duly sworn, did depose and say that he resides in the Town of Cheektowaga; that he is the President of PFOHL BROS. INC., the corporation described in and which executed the above instrument that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order.

HAROLD P. KELLY
Harold P. Kelly
Notary Public
In and for Erie County, N.Y.
My Commission expires March '50.

Affidavit of Victor T. Fuzak.

THIS INDENTURE

Made the 31st day of August in the year One Thousand Nine Hundred and Fifty-seven

BETWEEN PFOHL BROS. INC., a corporation created by and under the Laws of the State of New York, and having its place of business at #138 Pfohl Road, Cheektowaga, New York, party of the first part, and

REGENT SAND & GRAVEL CORP., a corporation created by and under the Laws of the State of New York, and having its place of business at #2255 Bailey Avenue, in the City of Buffalo, New York,

party of the second part,

WITNESSETH, that the said party of the first part, in consideration of the sum of one and no/more dollars ($1.00 & no/more), lawful money of the United States, paid by the said party of the second part, doth hereby grant and release unto the said party of the second part, its successors and assigns forever,

ALL THAT TRACT OR PARCEL OF LAND, situate in the Town of Lancaster, County of Erie and State of New York, being parts of Farm Lots Nos. 4 and 6, Section 5, Township 11, Range 6 of the Holland Land Company's Survey, bounded and described as follows:

BEGINNING at a point in the northerly line of Lot No. 6 which is also the conter line of Peppermint Road distant easterly 602 feet from the northwest corner of said Farm Lot No. 6; running thence southerly parallel with the westerly line of said Farm Lot No. 6, 1707.34 feet; running thence easterly along the southerly line of lands conveyed by Buffalo Sand Co. Inc. to George C. Frey by deed dated April 29, 1949 and recorded in Erie County Clerk's Office on that day in Liber 4509 of Deeds at page 443, 2039.32 feet to a stake situated on the easterly line of Lot No. 4, distant southerly 1545.72 feet from the northeasterly corner of said Lot; thence northerly along the easterly line of said Lot No. 4, 1545.72 feet to the northeast corner of said Lot, said point being also in the cente line of Peppermint Road; thence westerly along the northerly line of said Lot No. 4, 1225.62 feet; thence southerly at right angles 132 f thence westerly at right angles 62.5 feet; thence northerly at right angles 132 feet to the northerly line of said Lot No. 4; thence westerly along the northerly line of Lots Nos. 4 and 6, 622.51 feet to the place of beginning, containing 75.60 acres, be the same more or less.

And subject, however to:

1. Oil and gas lease given to Depew and Lancaster Light, Power and Conduit Co. dated August 28, 1925 and recorded in Erie County Clerk's office in Liber 1849 of Deeds at page 232 on September 3, 1925.

2. Utility easement granted to New York State Electric & Gas Corporation by instrument recorded in Erie County Clerk's Office in Liber 3917 of Deeds at page 516 on June 19, 1946.

SCHEDULE 2

LIBER 7581 PAGE 32

3. Agreement between George C. Frey and Pfohl Bros. Inc., as modified and recorded in Erie County Clerk's Office in Liber 4518 of Deeds at page 251.

4. Utility easement granted to New York State Electric & Gas Corporation by instrument recorded in Erie County Clerk's Office in Liber 4746 of Deeds at page 591 on June 15, 1950.

5. Lease recorded in Erie County Clerk's Office in Liber 84 of Miscellaneous Records at page 93.

TOGETHER with the appurtenances; and all the estate and rights of the said party of the first part in and to said premises.

TO HAVE AND TO HOLD the above granted premises unto the said party of the second part, its successors and assigns forever.

And the said party of the first part doth covenant with the said party of the second part as follows:

That the party of the second part shall quietly enjoy the said premises.

That the grantor, in compliance with Section 13 of the Lien Law, will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement, and that the grantor will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

That the said party of the first part will forever warrant the title to said premises.

IN WITNESS WHEREOF, the said

PFOHL BROS. INC.

hath caused its corporate seal to be hereunto affixed, and this Indenture to be subscribed by its duly authorized officer the day and year first above written.

PFOHL BROS. INC.

By _____
President.

REAL ESTATE TRANSFER TAX STATE OF NEW YORK $72.05

Affidavit of Victor T. Fuzak.

STATE OF NEW YORK:
COUNTY OF ERIE : SS
CITY OF BUFFALO :

On this 31st day of August 1957, before me personally came Ludwig F. Kahle, to me known, who, being by me duly sworn, did depose and say: that he resides at #96 Huntley Road, Buffalo, N.Y.; that he is the President of PFOHL BROS. INC. the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

Notary Public - Erie County.
Commission Expires, March 30, 195

Affidavit of Victor T. Fuzak.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RECEIVED
JAN 1975
HAIGHLE, DARLING, WEISS & HALPERN
FIRST MARKED Dec 4 1974

GEORGE C. PREY READY-MIXED CONCRETE, INC.
GEORGE C. FREY BATCHING PLANT, INC., and
HERBERT FREY and LOIS MUCK as co-exeuctors
of the Estate of GEORGE C. PREY, Deceased

Plaintiffs

-vs-

PINE HILL CONCRETE MIX CORP.,
REGENT SAND & GRAVEL CORP.,
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC.,
a dissolved corporation, and
PFOHL BROTHERS, INC.

Defendants

AFFIDAVIT ON MOTION FOR PROTECTIVE ORDER

CIVIL 1970-277

STATE OF NEW YORK)
: SS.
COUNTY OF ERIE)

VICTOR T. FUZAK, being duly sworn, deposes and says:

1. This affidavit is filed in answer to the affidavit of Elwin G. Day and of Arnold Weiss, both apparently sworn to on December 27, 1974. It is also made in support of defendants' application for a Protective Order with respect to the Notice for Production of Documents served by plaintiffs.

2. Submitted with this affidavit and incorporated herein by reference as a part of the papers and information on this application, is defendants' Notice of Motion and supporting affidavits for an Order dismissing the complaint herein on the grounds that the complaint fails to state a claim upon which relief can be granted; that the Court does not have jurisdiction over the parties or the subject matter; that various allegations of claimed wrongdoing are barred by the Statute of Limitations; and that the defendants are entitled to summary judgment dismissing the complaint. These papers are relevant and material to this application in that they relate to the issues proposed to be raised by the complaint and the insufficiency of the complaint. The scope of discovery is limited by the claims for relief properly and factually stated in the complaint.

3. At the time of oral argument of this motion on December 30, counsel for the plaintiffs indicated, among other things, that an essential reason for the Notice to Produce the wide variety of documents generally described is that plaintiffs' seek discovery in order to amend their complaint to allege facts in an effort to support the generalized claims and accusations contained therein. Among other remarks made by plaintiffs' counsel was a statement to the effect that the complaint in this action was prepared as a "notice" type of pleading and that the examination of records and of the defendants is required in

order to ascertain facts to be pleaded in an amended complaint. Deponent submits that this is not an appropriate purpose for the discovery of documents or for examinations before trial. Any discovery of documents must necessarily be limited by the complaint in which the plaintiffs purport to set forth the issues involved in the proceeding.

4. The following comments are made with respect to specifically designated portions of Mr. Day's affidavit:

7(a-f). There are no allegations in the complaint to the effect that defendants have been engaged in the practice of selling ready-mixed concrete below cost or at an operating loss; there is no statement as to how that fact, if it were true, would have relevance to this proceeding; there is no allegation in the complaint that any such conduct would constitute a violation of the antitrust laws; the testimony of the plaintiffs' own officers adduced before the Magistrate establishes that the plaintiffs themselves have been engaged in this conduct.

8(a). Mr. Day alleges that it is necessary for plaintiffs to see the items described in VI and VII of plaintiffs' notice in order to show to what extent defendants have been "realizing a profit, rather than claimed losses, on sales of grit and gravel to plaintiffs". The assertion that the

defendants have made claims of losses in connection with sales of grit and gravel to plaintiffs is totally false. Accordingly, that false premise affords no basis for the proposed examination.

8(b). Mr. Day further asserts that these documents are necessary in order to determine to what extent defendants have been: "realizing a profit, rather than claimed losses, on trucking expense charge to plaintiffs". Once again, this statement by Mr. Day that the plaintiffs have claimed losses with respect to trucking expense charges to plaintiffs is totally false. Once again, the false premise can hardly form the basis for the proposed examination.

8(c). Mr. Day says that the inspection is necessary in order to show to what extent defendants are "utilizing subsidiaries or affiliates, such as defendant Regent Sand & Gravel, Quadco Trucking, Lancaster Sanitary Land Fill, and other such corporations, to artificially peg material and service costs to justify price increases to plaintiffs". Neither Quadco Trucking nor Lancaster Sanitary Land Fill is a subsidiary or an affiliate of any of the defendants. Neither of those corporations are parties to this action. The complaint contains no allegations whatsoever of anticompetitive price increases to plaintiffs. The complaint alleges a purported breach of contract only.

8(d). There is no allegation that the defendants have attempted to charge plaintiffs prices for grit and gravel in excess of prices charged by defendants to other customers and competitors of plaintiffs. There is no provision in the law which permits the plaintiffs to dictate to the defendants what prices defendants will charge to all customers, including plaintiffs, for grit and gravel, irrespective of what production costs may or may not be.

8(e) Plaintiffs have been supplied with records which would have any relationship to the demand under this sub-paragraph.

8(f). Comments made above with respect to Paragraph 8(d) are applicable here. In addition, it is apparent from the testimony of Herbert Frey, the President of plaintiffs, that the plaintiffs themselves do not prepare price lists on a cost accounting or projected basis and are hardly in a position to raise that kind of allegation or complaint against the defendants.

8(g), (h) and (j). There are no allegations in the complaint with respect to which these inquiries could relate. The complaint does not allege that the defendants have charged plaintiffs with artificially elevated prices or that the defendants have been engaged in any discriminatory conduct with

respect to defendants vis-a-vis other customers or competitors, or that the defendants have been obtaining better prices on raw materials than plaintiffs have been able to obtain. Nor is there any showing as to the relevance of any such accusations with respect to a claim of antitrust violation.

8(i). Mr. Day alleges that the various materials are required to determine whether or not the defendants are operating more efficiently than the plaintiffs and makes the false assertion that the defendants have claimed that defendants operate more efficiently than plaintiffs. There are no allegations in the complaint to which the demand can relate.

8(k), (l) and (m). These are shotgun statements essentially covered by the preceding paragraphs, as to which comments have already been made.

With respect to the allegations contained in Paragraph 13 of Mr. Day's affidavit, the plaintiffs were given access to account receivable customer cards requested, but defendants properly refused to give current information relating to current competitive activities.

With respect to Paragraph 15 of Mr. Day's affidavit, the assertion made makes it apparent that what the plaintiffs are actually seeking is free access to make what would amount to

a complete "audit" of all of the books and records of defendants over a period in excess of 20 years. This is obviously not permissible.

5. No detailed response to the affidavit filed by Arnold Weiss appears to be necessary in view of the materials already before the Court. However, as is the case with Mr. Day's affidavit, Mr. Weiss's affidavit is premised on a number of false assumptions:

a) On page 4 Mr. Weiss states: "However, plaintiffs have learned that Quadco is owned by defendant Ludwig Kahle and operated by Pine Hill." This same false assertion was made by plaintiffs and on their behalf in other papers filed with the Court, and was corrected by an affidavit filed by Mr. Norman M. Moran, the Cor oller of Pine Hill, and also by his testimony on October 16, 1974. It is, as the plaintiffs know, a false statement. Quadco is not owned by defendant Ludwig Kahle; Quadco is not operated by Pine Hill.

b) At page 5 of his affidavit, Mr. Weiss makes the following statement: "Lancaster Sanitary Land Fill, Inc. is also managed and operated by Pine Hill. It appears that Lancaster reimburses Pine Hill as much as $45,000.00 per month." Both statements are false.

c) Again on page 5 of his affidavit Mr. Weiss states in support of the various arguments made to see the broad variety of documents, that: "Stage Farms, Inc. (gravel company) is similarly managed or operated for the sum of $200.00 per month." This statement is also false. There is no such corporation as Stage Farms, Inc. in existence. No such corporation is managed or operated by Pine Hill.

d) On pages 8 and 9 of Mr. Weiss's affidavit, reference is made to various portions of the transcripts of the depositions of plaintiffs, ostensibly to establish the claim of an agreement among counsel that the defendants would produce for plaintiffs' inspection whatever plaintiffs produced for defendants' inspection. Review of the portions of the record cited will demonstrate that the items referred to were either requests by plaintiffs' counsel for agreement of reciprocity which was not made, or that agreement was made but in a limited fashion. For example, reference is made to 194-5 with the apparent claim that agreement was reached that the defendants would produce "Purchase records 1949 to date". On the contrary, the agreement made was that the defendants would produce mechanics wages records for 1971 and 1972. Furthermore, at page 325 Mr. Manz stated: "In other words, at that time I said we would furnish to you whatever was material to your

lawsuit and if there was a discussion we would like the Judge to decide." Recognition of the fact that no agreement of "reciprocity" had been made during the course of the deposition appears at pages 403-7. As the record indicates, plaintiffs' counsel consistently attempted to obtain agreement from defendants' counselof complete reciprocity, but was consistently refused.

7. There is no justification for inspection of records of any kind of Quadco Trucking Corp. or of Lancaster Sanitary Land Fill, Inc. These corporations are not parties to this action. Plaintiffs' motion to add these entities is conspicuously deficient in setting forth any basis whatsoever for including them as defendants (See attached motion papers).

s/Victor T. Fuzak

Subscribed and sworn to
this 10th day of January, 1975.

s/Deane L. Manning

Notary Public, State of New York
My Commission Expires [illegible] 19 76

Letter Dated January 14, 1975 from Victor T. Fuzak.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
ATTORNEYS AT LAW
1800 ONE M & T PLAZA
BUFFALO, N. Y. 14203

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RALPH W. LARSON
CLARENCE OBLETZ
HUGH MCM. RUSS, JR.
CHARLES J. HAHN
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JAMES A. PORTER
ROBERT H. HILTENBERGER, II
WILLIAM H. GARDNER
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JOHN C. BARBER, JR.
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ROBERT B. CONKLIN

GEORGE A. NEWBURY
COUNSEL

TELEPHONE
716-856-4000

January 14, 1975

Hon. John T. Curtin
United States District Court
United States Courthouse
Buffalo, New York 14202

Dear Judge Curtin:

Re: George C. Frey Ready-Mixed Concrete Inc., et al v. Pine Hill Concrete Mix Corp., et al - Civil 1970-277

Yesterday I received a telephone call from Mr. Weiss's secretary advising me that Mr. Weiss was in the Virgin Islands and was not expected to return to the office until on or about January 20. The request was made that our motion for dismissal of the complaint be adjourned until February 10. I indicated that we would not expect argument of the motion on January 20 under those circumstances, but that I would talk with Mr. Weiss upon his reutrn concerning a different date for argument.

This morning I received an affidavit entitled "Affidavit in Opposition and for Deferral" subscribed to by one of Mr. Weiss's associates, Mr. R. William Stephens. Among other things, Mr. Stephens states to the Court that: " . . . it appears to deponent that there is a question of good faith on the present motion." Under the circumstances, and in order to avoid similar accusations of lack of good faith by reason of any agreement on our part to delay argument of the motion for dismissal, I have telephoned Mr. Stephens and advised him that we would be present on January 20 in order to let Your Honor decide whether our motion should be held at that time or deferred for argument to another

COPY

Letter Dated January 14, 1975 from Victor T. Fuzak.

date. We are prepared to go forward with argument. Under normal circumstances we would have no objection to some adjournment in order to accomodate counsel, however, in view of the unseemly allegations concerning our good faith in the making of this motion, the repeated protestations of plaintiffs' counsel that they are desirous of moving forward on this matter without delay, and the repeated demands of plaintiffs' counsel that defendants attend to matters associated with this proceeding through substitute or replacement counsel when and if necessary, we believe the defendants' motion for dismissal of the complaint should be held at the earliest possible time.

We shall, of course, file a formal affidavit in response to Mr. Stephens' affidavit.

Respectfully yours,

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

By

Victor T. Fuzak

VTF:skw
Copies to: Hon. Edmund F. Maxwell
United States Magistrate

Raichle, Banning, Weiss & Halpern

Victor Manz, Esq.

COPY

Defendants' Motion to Stay Discovery.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased

Plaintiffs

-vs-

PINE HILL CONCRETE MIX CORP., et al

Defendants

NOTICE OF MOTION FOR STAY OF DISCOVERY PROCEEDINGS

CIVIL 1970-277

Defendants move the United States Magistrate pursuant to the Order of this Court entered the 24th day of November, 1974 for an order staying proceedings by plaintiffs under Rules 30 and 34 of the Rules of Civil Procedure, or otherwise, relating to depositions and discovery, pending the determination by the Court of defendants' motion for dismissal of the complaint.

PLEASE TAKE NOTICE, that this motion will be brought on for argument before the United States Magistrate on Wednesday, January 29, 1975 at 3:30 o'clock p.m. at the United States Courthouse, Niagara Square, Buffalo, New York.

Dated: Buffalo, New York
January 24, 1975

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

By s/ Victor T. Fuzak
Victor T. Fuzak
A Member of the Firm
Attorneys for Defendants

Supporting Affidavit of Victor T. Fuzak.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased

Plaintiffs

AFFIDAVIT

-vs-

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

CIVIL 1970-277

Defendants

STATE OF NEW YORK)
: SS.
COUNTY OF ERIE)

VICTOR T. FUZAK, being duly sworn, deposes and says:

1. This affidavit is submitted in support of defendants' motion for a stay of proceedings by plaintiffs with respect to depositions and discovery under Rules 30 and 34, or otherwise, of the Rules of Civil Procedure, pending determination by the Court of defendants' motion to dismiss the complaint.

Supporting Affidavit of Victor T. Fuzak.

2. On January 10, 1975 the defendants served a motion to dismiss the complaint on the grounds: that the complaint fails to state a claim upon which relief can be granted and is therefore insufficient on its face; that the Court does not have jurisdiction over the parties or over the subject matter of this action; that the defendants are entitled to summary judgment dismissing the complaint on the basis of affidavits and testimony already before the Court; and that the plaintiffs' claims are barred by the Statute of Limitations. That motion was returnable on January 20. Pursuant to a request from plaintiffs' counsel, defendants' counsel acquiesced in an adjournment of the return date of the motion to February 10 in order to accomodate plaintiffs' counsel's schedule. After that agreement, plaintiffs' counsel filed an affidavit with the Court and counsel seeking a complete deferral of argument of the motion until completion by plaintiffs of discovery proceedings and amendment of their complaint, or until the pretrial conference immediately before trial of the action. On January 20 the Court declined to defer hearing of the motion for dismissal as requested but, on plaintiffs' application, ordered that plaintiffs are to file affidavits in opposition to the motion by February 24, 1975, that memoranda of law for both sides are to be filed by March 10, 1975, and that the Court will hear oral arguments on March 17, 1975. Discussion was had at that time

concerning a stay of further discovery proceedings by plaintiffs until determination of the motion for dismissal, concluding with the Court stating that in view of the fact that all matters relating to discovery had been referred by the Court to the Magistrate, that defendants should apply to the Magistrate for any stay desired.

3. The stay of further discovery proceedings by plaintiffs is sought on the following grounds:

(a) A primary basis for the motion for dismissal of the complaint is that the complaint is insufficient on its face and does not state a claim upon which relief can be granted. This is, of course, a threshold issue to any proceedings in this action. If the complaint is insufficient, it would be improper and damaging to defendants to permit plaintiffs to have discovery and inspection of records containing confidential competitive information. Accordingly, that issue should be determined before any further intrusion into defendants' businesses is permitted.

(b) A second ground for dismissal of the complaint is that the Court does not have jurisdiction over the parties or over the subject matter. The facts with respect to the activities of the parties to this action and their relationship, if any, to

interstate commerce are already before the Court in the form of the numerous affidavits filed by both parties and the testimony of the plaintiffs themselves. Facts with reference to jurisdiction can also be established by the filing of affidavits in connection with the motion to dismiss. The question of jurisdiction is also a threshold question which should be decided before embarking upon a protracted and expensive trial or before continuance of burdensome, protracted, and competitively harmful discovery proceedings.

(c) In light of the statements made by plaintiffs' counsel both in argument to the Court and to the Magistrate, and in affidavits filed in this proceeding, it appears that plaintiffs recognize that their complaint is legally inadequate and insufficient, and that plaintiffs acknowledge that the essential purpose of the discovery they seek is to attempt to ascertain information which it is hoped will permit an amendment of the complaint in order to make it legally sufficient and adequate. The Magistrate will recollect that at the time of oral argument of defendants' motion for a protective order, on December 30, 1974, counsel for the plaintiffs indicated, among other things, that an essential reason for the Notice to Produce the wide variety of documents generally described in the Notice is that the plaintiffs seek discovery in order to amend their complaint

to allege facts in an effort to support the generalized claims and conclusory allegations contained therein. Among other remarks made by plaintiffs' counsel at that time was the statement that the complaint in this action was prepared as a "notice" type of pleading and that the examination of records and of the defendants is required in order to ascertain facts to be pleaded in an amended complaint. Further, in an affidavit sworn to January 13, 1975 by R. William Stephens, one of the plaintiffs' counsel, and filed with the Court in opposition to defendants' motion for dismissal of the complaint and in support of plaintiffs' application for deferral of the argument of that motion, the following statement is made on behalf of plaintiffs: "Accordingly, deponent requests that the Court defer defendants' motion under FRCP Rules 6(b) and 56(f) for three weeks; and further defer the same for the reasons hereafter stated, until plaintiffs complete their discovery and serve their amended complaint on defendants, or until the final pretrial hearing before the trial presently scheduled for March 1, 1975." That affidavit further states on behalf of plaintiffs: "On various occasions, plaintiffs have informed the Court and defendants' counsel that plaintiffs intend to serve an amended complaint to more specifically delineate defendants' antitrust violations, and would do so immediately after plaintiffs completed, and with direct allegations supported by, plaintiffs' pretrial discovery." In addition, the further

statement is made in that affidavit: "Deponent submits that the complaint herein has been effectively amended by the many anti-trust charges of which plaintiffs became apprised only after the action was commenced and which are set forth in plaintiffs' affidavit heretofore served, and in the testimony which plaintiffs gave on their depositions taken by defendants." The affidavit goes on to state:

> "22. Plaintiffs will move to serve an amended complaint, if necessary, as soon as they learn from their discovery the full extent of defendants' anticompetitive policies and actions.
>
> 23. A further example of plaintiffs' difficulty in alleged (sic) detailed facts against defendants is that plaintiffs are only now learning all of the facts."

It is thus apparent that the real purpose of the proposed examinations before trial and discovery and inspection of documents is to attempt to ascertain facts in order to frame a proper complaint.

(d) No litigant in the Federal Court, and particularly one commencing an action of such consequence both to the parties and to the Court, should be permitted to file a legally insufficient complaint as a device of obtaining otherwise unavailable discovery rights for the purpose of inquiring into confidential competitive information and of attempting to develop some basis upon which to state a legally cognizable

claim. There is no procedure under the Rules of Civil Procedure permitting such an approach. On the contrary, as set forth in Rule 27, depositions before the commencement of an action are only permitted in very limited circumstances, in order to preserve testimony, and only upon specific petition to the Court. It is submitted that what plaintiffs are attempting to do in this matter is in effect to obtain discovery and inspection prior to the filing of a proper complaint, for the purpose of delving into confidential competitive information for business reasons and for the purpose of attempting to determine if there is any conceivable basis upon which a legally cognizable claim can be made.

(e) In view of plaintiffs' numerous requests for additional time and adjournments with respect to motions and proceedings in this matter, with which the Magistrate is familiar, the plaintiffs are not now in a position to raise objections to the limited amount of delay which would be occasioned in these proceedings by staying depositions and discovery until the Court has had an opportunity to rule upon plaintiffs' motion for dismissal. The Magistrate is aware that the defendants have proceeded promptly with respect to all matters before the Magistrate in this proceeding and have demonstrated their good faith in moving expeditiously to obtain a final resolution of the proceedings.

Supporting Affidavit of Victor T. Fuzak.

(f) Orderly procedure and the interests of justice will be served by conditioning further depositions or discovery by plaintiffs on the Court's determination of defendants' motion to dismiss.

WHEREFORE, defendants respectfully request that an order be entered by the Magistrate that discovery proceedings by plaintiffs under Rules 30 and 34 of the Rules of Civil Procedure, and otherwise, be stayed until determination of defendants' pending motion to dismiss the complaint in this action.

s/ Victor T. Fuzak

Subscribed and sworn to
before me this 24th day
of January, 1975.

s/ Carole L. Zeiher

CAROLE L. ZEIHER
Notary Public, State of New York
Qualified in [illegible]
My Commission E[illegible] 76

Plaintiffs' Motion to Serve Amended Complaint.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

CIVIL NO. 1970-277

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHEL, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

PLAINTIFFS' MOTION FOR LEAVE TO SERVE AN AMENDED AND SUPPLEMENTAL COMPLAINT.

Plaintiffs move the Court pursuant to Rule 15 of the Federal Rules of Civil Procedure for leave to serve an amended and supplemental complaint herein, so as to assert, the additional facts and claims which were revealed by plaintiffs' discovery of defendants' records and by plaintiffs' investigation subsequent to the institution of this action, and to amend the title and change the name of the plaintiffs' corporation to Frey Concrete, Inc., being the corporation resulting from the merger thereof, and adding as parties defendant, defendants' related and affiliated corporations known as Quadco Hauling Corp. and Lancaster Sanitary Landfill, Inc., and granting such other and further relief as may be just and proper in the premises.

Plaintiffs' Motion to Serve Amended Complaint.

PLEASE TAKE NOTICE that the within motion is based upon the plaintiffs' proposed amended and supplemental complaint herein, dated March 7, 1975, the affidavits of Herbert G. Frey and Lois Muck, both sworn to March 7, 1975, and upon each of the affidavits, pleadings and proceedings heretofore filed or had herein to date.

Dated: Buffalo, New York
March 7, 1975.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 852 7587

TO: VICTOR T. FUZAK, ESQ.
HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
1800 One M & T Plaza
Buffalo, New York 14203

PLEASE TAKE NOTICE that plaintiffs will bring the within motion on for argument on March 17, 1975 at 2:00 P.M., being the date fixed by the Court for the argument of defendants' motion dated January 10, 1975 for a dismissal of the complaint and for summary judgment, or upon the date to which the aforesaid motion is adjourned by the Court.

Dated: Buffalo, New York
March 7, 1975.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 852 7587

Supporting Affidavit of Herbert G. Frey.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CO[illegible]RETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

CIVIL NO. 1970-277

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

AFFIDAVIT OF HERBERT G. FREY IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF MOTION TO SERVE AMENDED AND SUPPLEMENTAL COMPLAINT.

Defendants.

STATE OF NEW YORK:
ss
COUNTY OF E R I E:

HERBERT G. FREY, being duly sworn, deposes and says:

1. I am President of Frey Concrete, Inc., the successor by merger and change of name of George C. Frey Ready-Mixed Concrete, Inc., and George C. Frey Batching Plant, Inc.

2. I make this affidavit in opposition to defendants' motion dated January 10, 1975 for a dismissal of the complaint and for summary judgment. Deponent incorporates herein, and

makes a part hereof, the affidavits heretofore submitted to the Court on behalf of plaintiffs in connection with the matters and proceedings heretofore had and taken herein.

3. Deponent also submits this affidavit in support of plaintiffs' motion for an order granting leave to serve an amended and supplemental complaint which will set forth the additional facts and claims which were revealed by plaintiffs' discovery of defendants' records and plaintiffs' investigations during the pendency of this action; as well as amending the name of the plaintiff corporations to "Frey Concrete, Inc."; and adding as additional defendants Lancaster Sanitary Landfill, Inc. and Quadco Hauling Corp. as requested in plaintiffs' motion dated October 22, 1974.

4. Both plaintiffs and defendants are engaged in interstate commerce as defined in the federal laws relating to antitrust and trade regulation, and they both compete in industries which are engaged in commerce and which have a material and significant effect on commerce.

5. Both plaintiffs and defendants are engaged in the business of manufacturing, selling, delivering and pouring ready-mixed concrete as follows: directly in interstate commerce; on and across international waters; to and for instrumentalities of commerce; for the roads, airports, railways, waterways, channels and arteries of interstate

commerce; to companies and industries completely or heavily directly engaged in interstate commerce; to interstate common carriers; to companies engaged in interstate power and message transmission; to manufactures of products which are themselves shipped in interstate commerce; for the highway, airports, bridges, waterways, immigration facilities, customs facilities, channels and arteries of international commerce; and for other sales and applications directly and indirectly to or for instrumentalities, arteries and channels of interstate and international commerce, to companies engaged therein, and for products shipped therein.

6. Without attempting to be all-inclusive, and by way of specific example, more than 75% of the concrete business in Western New York consists of manufacturing, selling, delivering and pouring concrete in, for and to interstate or international projects of the following description:

A. Airport projects sponsored jointly by the Greater Buffalo International Airport and the Federal Aviation Administration at Buffalo International Airport, and directly related to the runways, landing and take-off of airplanes, and to the enplaning and deplaning of passengers, in interstate and international air freight and passenger transportation and commerce;

B. Construction of and repairs and renovations to Federal Interstate, Federal and State interstate highways, including the New York State Thruway, Niagara Expressway, etc., under joint state-federal sponsorship and funding;

C. Interstate and international common carriers by rail, such as the Penn Central Railroad, Erie-Lackawanna Railroad, Lehigh Valley, etc. on road beds and trackage also used by international rail carriers;

D. Interstate, and internationally interconnected, public utilities including Niagara Mohawk Power Corporation, National Fuel Gas Distributing Corp., New York State Gas and Electric Corp. and New York Telephone Company which interconnects the Buffalo area with the American Telephone and Telegraph Company and the Canadian telephone facilities;

E. Interstate and international bus and truck terminals, including the Greyhound Bus Terminal and the new Metro Bus Terminal which also serves Canada, and the various large truck terminals;

F. Federal Harbor, Flood Control and Dam projects under the supervision of the Corps of Engineers of the United States Army, including the Buffalo Harbor improvements, Lancaster Flood Control Project and the West Seneca Flood Control Project;

G. The International Peace Bridge connecting Fort Erie, Ontario, and Buffalo, New York;

H. Interstate radio and television stations, towers and facilities located in Western New York, including WBEN radio, and WBEN-TV television;

I. Concrete products fabricated in the Buffalo area with concrete supplied by plaintiffs and defendants, including concrete highway guard rails and pre-cast concrete retaining wall lattice type section manufactured by Cable Guide Co., L. J. Thornton and Guard Rail Company;

J. To the many Western New York industries engaged in, and which, receive most of their input or raw materials and ship most of their production or output, in interstate and international commerce, including: Bethlehem Steel Corporation, State University of New York at Buffalo, General Motors Corporation, Ford Motor Company, American Brass Company, Republic Steel Corporation, Huron Cement Company, Spaulding Fiber Company, Dunlop Tire and Rubber Corp., grain elevators and docks, Dresser Industries, F. N. Burt Company, Arcate Corporation, Trico Products Corporation, etc.;

K. Concrete users on international waters such as the Great Lakes and Niagara River requiring barging over international waters, including: barging concrete on Lake Erie for harbor break-walls and waterway retaining walls under the supervision of the Corps of Engineers of the United States Army, and trucking concrete over the International Railway Bridge for the City of Buffalo water

treatment plant on Bird Island in the Niagara River; and

L. Other and varied customers and users, who are part of and engaged in the instrumentalities, arteries, channels of interstate commerce, which are serviced by defendants and plaintiffs, and others similarly engaged, the identity and extent of which can only be fully ascertained by further pre-trial depositions, and discovery, which is presently being held in abeyance herein at the request of the defendants.

7. In addition, the plaintiffs and defendants, as well as the other companies engaged in the sale, production, delivery and pouring of ready-mixed concrete in the Western New York area, also make well over 50% of their expenditures for raw materials and equipment in interstate and international commerce as follows:

A. Cement, which constitutes approximately one-third of the selling price of concrete, is imported by plaintiffs and defendants, principally from Michigan and the Province of Ontario, to the extent

of over $500,000.00 apiece, annually;

B. Much of fuel for operating the ready-mixed trucks and heating the aggregate and concrete is imported in interstate and international commerce;

C. Additives giving the concrete the special properties and applications requested by the customers are imported in interstate commerce;

D. Almost all equipment, including ready-mixed trucks, batching plants and other associated equipment, is imported in interstate commerce; and

E. Special lightweight aggregates imported by plaintiffs and defendants, including Haydite imported from the Province of Ontario, Canada (the imports of which by plaintiffs alone in 1973 and 1974 amounted to $80,000.00), and defendants' lightweight perlite raw material, which is imported from the western part of the United States.

Supporting Affidavit of Herbert G. Frey.

8. In summary, I would like to state that it would be impossible to engage in the ready-mixed concrete business in the Buffalo area without resorting to interstate commerce for raw materials, equipment and supplies; or without selling to customers or for projects engaged in or directly involving interstate commerce.

H. Herbert G. Frey

Herbert G. Frey

Sworn to before me this

7th day of March 1975.

Terry Szymczyk

TERRY SZYMCZYK
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 76

Supporting Affidavit of Lois Muck.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

CIVIL NO. 1970-277

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

AFFIDAVIT OF LOIS MUCK IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF MOTION TO SERVE AMENDED AND SUPPLEMENTAL COMPLAINT.

Defendants.

STATE OF NEW YORK:
ss
COUNTY OF E R I E:

LOIS MUCK, being duly sworn, deposes and says:

1. I am an officer, to wit: Secretary-Treasurer of Frey Concrete, Inc., the corporation resulting from the merger of the two plaintiff corporations, and I make this affidavit in opposition to defendants' motion to dismiss and for summary judgment, and in support of plaintiffs' motion to serve an amended and supplemental complaint.

Supporting Affidavit of Lois Muck.

2. For a long time prior to the institution of this action on June 17, 1970, plaintiffs had experienced substantial economic coercion, discrimination, monopolization and other anti-competitive practices from the predatory and monopolistic policies of the defendants in the ready-mixed concrete and the concrete grit and gravel aggregate businesses.

3. These practices became more acute and more pointed in 1957 when defendant Pine Hill purchased plaintiffs' gravel supply, its Lease and Agreement, and its premises and facilities from Pfohl Brothers, Inc. Plaintiffs had sold the same to Pfohl in 1949 on the express written condition and covenant, agreement and understanding, and in the mutually expressed intent, that plaintiffs would be assured of a permanent, low cost, high quality and readily available source of gravel delivered without charge to their batch plant bins, so as to enable plaintiffs to compete effectively in the ready-mixed concrete and gravel businesses even though it had disposed of its gravel supply and washing plant.

4. As would be expected, the Lease and Agreement between Pfohl Brothers, Inc. and plaintiffs contained many protective provisions, mechanisms and principles for the implementation of these objectives. It also set forth a detailed procedure for price increases and to insure compliance with conditions prevailing in other gravel pits, as well as guarantees against inordinate price increases which could hinder plaintiffs' competition with other concrete producers such as defendant Pine Hill.

5. The Lease and Agreement between Pfohl Brothers and plaintiffs further contained a prohibition against Pfohl Brothers ever entering the concrete ready-mixed business in the County of Erie. The purpose of this clause was to insure that plaintiffs would never be competing with, and have an adverse interest with respect to, their vital gravel supplier; and conversely that their vital gravel supplier would not have an adverse interest, conflict interest, or an adverse competitive interest, to Frey.

6. During the period that Pfohl Brothers served as plaintiffs' supplier, plaintiffs were able to compete effectively against Pine Hill and plaintiffs business continued to increase on an annual basis and plaintiffs' share of the market increased, both on an absolute basis, and also as compared with Pine Hill's share of the market.

7. During this period of time, from 1949 when plaintiffs contracted with Pfohl Brothers as their gravel supplier, to 1957, when plaintiffs' principal competitor Pine Hill entered the picture, the Lease and Agreement with Pfohl Brothers was performed according to both its spirit and provisions, insofar as it involved the supply, and free delivery into plaintiffs' bins of gravel. For example, whenever during this period, market or business conditions appeared to require the same, Pfohl Brothers would advise plaintiffs of a proposed price increase, and negotiations would follow and a mutual decision was reached as to whether or not Pfohl Brothers would be entitled to all or part of the proposed increase or none at

all. Nor was there ever any attempt to modify or breach the free delivery provisions of its Lease and Agreement.

8. As a result of these negotiations between Pfohl Brothers and plaintiffs, during the pre-Pine Hill years of 1949 to 1957, the parties would, as they did in 1952, negotiate an increase or price change for plaintiffs which would be different and less than the price increase charged by Pfohl Brothers to the rest of the industry. This was all in recognition of the special contractual relationship which existed and the result of negotiations utilizing the machinery and procedures provided by the Lease and Agreement. (See Exhibit A annexed hereto, and to plaintiffs' motion dated June 7, 1971 for a separate trial).

9. During this period of time, Pfohl Brothers apparently remained in a non-competitive position with respect to plaintiffs in the ready-mixed concrete business as was required by the 1949 Lease and Agreement.

10. Recently, during the pretrial discovery proceedings in this action, plaintiffs learned that Pfohl Brothers had surreptitiously breached even this Agreement by acquiring a secret interest in Queen City Ready-Mixed Concrete, Incorporated.

11. When Pfohl Brothers sold out to Pine Hill in 1957, Pfohl Brothers also sold to Pine Hill this secret interest which they held in Queen City Ready-Mixed Concrete, Incorporated. (See ¶ 18A of Pfohl-Pine Hill Sale Agreement dated August 18, 1957, annexed hereto as Exhibit B).

12. At the same time in 1957, Pfohl Brothers also sold to Ludwig Kahle their interest in Quadco Hauling Corp., which was later resold to other members of the Kahle family. During the arguments before this Court when defendants were claiming 70¢ per ton for trucking, and then an increase to 90¢ per ton, by "outside independent truckers", they wrongfully and improperly withheld from the Court and from the plaintiffs: the fact that Quadco Hauling Corp. was an affiliated and related corporation owned by members of the Kahle family; the fact that Quadco Hauling Corp. is operating integrally with Pine Hill Ready-Mixed Corp.; the fact that Quadco and Pine Hill use the same telephone and telephone number; the fact that Pine Hill and Quadco e the same post office address and office personnel; the fact that Pine Hill and Quadco use the same service garage and maintenance facilities for their trucks; the fact that it did not cost defendants, or Kahles or Quadco, 70¢ per ton or 90¢ per ton, or any reasonably close figure, to haul grit and gravel a couple hundred yards from defendants' washing plant to plaintiffs' bins; and, the fact that the so-called Quadco "independent trucks', whose time and expenses were being fully paid for by plaintiffs under the Court order, were being utilized during most of that same period in hauling materials for Pine Hill and without cost to Pine Hill -- thus giving plaintiffs a double whammy weapon against plaintiffs.

13. Pine Hill, prior to its acquisition of Pfohl Brothers in 1957, was absolutely disqualified from acquiring either Pfohl Brothers, or plaintifs' gravel supply which was owned by Pfohl Brothers -- regardless of whether or not an anti-

competitive clause existed in the contract between Pfohl Brothers and plaintiffs.

14. Plaintiffs have been informed and believe that it is a basic and classic violation of the antitrust laws for a company to acquire the source of raw material supply of its major competitor, and especially to thereafter manipulate the price and supply thereof to said competitor. In this respect, Pine Hill has committed and continues the most blatant violations of the antitrust laws and continues to utilize the leverages thereby obtained over plaintiffs in a continuing and presently severe and concerted attempt to drive plaintiffs out of the ready-mixed concrete business.

15. Pine Hill's list of ready-mixed concrete acquisitions in the Buffalo area which disqualified it both under the antitrust laws, and the 1949 Pfohl Lease and Agreement, from acquiring plaintiffs' source of gravel supply from Pfohl Brothers, is as follows:

A. In 1949, Pine Hill was incorporated in the ready-mixed business;

B. In 1950, Pine Hill purchased Genesee Ready-Mixed Concrete Company;

C. In 1951, Pine Hill purchased Depew Ready-Mixed Concrete Company.

16. Not even content with letting the matter rest there, in 1959, two years after Pine Hill purchased Pfohl Brothers, it bought: the Verel Ready-Mixed plant on Electric Avenue in Blasdell; and in 1963, it purchased the Queen City Ready-Mixed Concrete Company and an exclusive dealing contract.

17. Ever since Pine Hill acquired Pfohl Brothers, Inc., Pine Hill has refused to comply with the provisions of the Lease and Agreement. Not only does Pine Hill compete with plaintiffs in direct violation of the contract, but Pine Hill refuses to comply with the pricing and price-determining procedures contained in the Agreement. In fact, Pine Hill even refuses to meet to discuss price increases but insists on its unilateral and conclusive right to arbitrarily set the price for plaintiffs' grit and gravel supplies regardless of the contract and the prevailing pit prices.

18. By reason of the foregoing wrongful practices of Pine Hill, and the anti-competitive actions which will be set forth later, plaintiffs' growth was arrested and its sales and production were and are substantially decreased from the pre-Pine Hill period, and from their normal competitive level.

19. Not only are defendants in the position of usurping and manipulating the prices of the supplies of their competitors' raw materials, but they have at the same time

engaged on a program of price cutting and below-cost concrete pricing in an all-out effort to drive plaintiffs out of the business.

20. During last year's proceedings, we repeatedly showed the Court that defendants were propositioning and stealing our customers with promises of adhering to their August 1971 prices of $22.00 per yard while they at the same time raised the grit, gravel and trucking prices they charged us to such an extent that plaintiffs had to increase their price to $23.70, and should have increased it to $25.00 per yard in order to continue to break even.

21. The proof that defendants were acting illegally in maintaining this $22.00 per yard price is ascertainable from the fact that all expenses, and the price of all raw materials, have increased at least $3.00 per yard of concrete since they established their August 1971 price of $22.00 per yard.

22. Pine Hill has now succeeded in taking all but three of plaintiffs' wall mix customers because plaintiffs cannot sell them concrete at Pine Hill's $22.00 per yard below-cost price.

23. During the initial two days of pretrial discovery, which plaintiffs have been thus far allotted by defendants,

plaintiffs were able to discover the secret of Pine Hill's anti-competitive practices.

24. On December 18 and 19, 1974 plaintiffs commenced their discovery of defendants' books and records, with the help of plaintiffs' accountant Mr. Elwin G. Day, a certified public accountant, and a member of the firm of Lathan, Lumsden, McCormick & Co.

25. It very soon became apparent that defendants were financing their below-cost sales of ready-mixed concrete, and their campaign to drive plaintiffs out of business, by subsidies from related companies to the extent of almost $500,000.00 per year, or based on their 1974 volume of approximately 150,000 yards, a "loss subsidy" of approximately $3.30 per yard. This made up the difference between the normal $25.00 break-even price and defendants' unjustifiable and predatory below-cost price of $22.00 per yard (See Affidavit of Elwin G. Day, sworn to December 22, 1974, and Affidavits of Arnold Weiss, sworn to December 27, 1974, and R. William Stephens, sworn to January 13, 1975).

26. Plaintiffs are now required to increase their basic price for wall mix concrete from $23.70 per yard to $25.50 per yard but will still not be operating at a break-even point. However, Pine Hill is continuing their offensive and

predatory plan of maintaining the $22.00 per yard price in the face of still further increases since last year, and prospectively greater price increase coming on April 1, 1975 of $4.00 per ton increase in cement, or roughly $1.00 per yard increase in the wholesale cost of production of wall mix concrete.

27. In addition, and as appears in numerous affidavits heretofore filed herein, all of which are incorporated herein and made a part hereof to avoid repetition, defendants have engaged in numerous other predatory, monopolistic and anti-competitive practices which can have no legitimate purpose, including:

A. Pine Hill used a tie and rebate of free fill in order to procure customers and prevent Frey from selling concrete. An important specific example of this was defendants' use of free fill as a rebate or additional tying consideration to obtain the concrete business for the Eastern Hills Shopping Mall.

B. Pine Hill grants rebates or refunds to customers, including

customers it has taken from Frey, and further cutting its predatory $22.00 per yard price so as to still further undersell Frey Concrete, Inc. by over $3.00 per yard.

C. One medium through which the rebates and free fill tie-in is accomplished is the proposed additional defendant Lancaster Sanitary Landfill, Inc. which is owned by the defendant Ludwig Kahle. Plaintiffs' initial investigation of defendants' records on December 18 and 19, 1974 show that Lancaster Sanitary Landfill, Inc. is operated as a captive alter ego of Pine Hill. Each month, Lancaster Sanitary Landfill, Inc. pays Pine Hill for administration and operative expenses, for land rental, for equipment rental, for employees' salaries, for labor, etc. enough money to substantially cover Pine Hill's losses in selling below-cost in its efforts to drive plaintiffs out of business.

For example, Exhibits C, D, E and F annexed hereto show that during the month of August, 1974 Lancaster Sanitary Landfill, Inc. paid Pine Hill approximately $37,000.00, and similar sums were paid each month during 1973 and 1974 (proportionately lower sums were paid during prior years in line with the lower cost of living then prevailing), as is shown on the summary figures at the bottom of said Exhibits.

D. Similarly, plaintiffs' initial inspection of defendants' records on December 18 and 19, 1974 disclosed that Quadco Hauling Corp. is also operated by Pine Hill and that during the month of August, 1974, Quadco paid Pine Hill over $12,000.00 and paid proportionately similar amounts in other months in compensation for Pine Hill's hauling expenses on behalf of Quadco. (See Exhibits H, I and J annexed hereto).

Quadco and Pine Hill were making a profit of $340.00 per day on trucking alone based on the fictitious charge of 70¢ per ton. (See Affidavit of Herbert G. Frey, sworn to October 24, 1974). It thus develops that the other proposed defendant Quadco Hauling Corp. is another alter ego of Pine Hill which is operated by Pine Hill and which defendants attempted to use as a deceptive decoy to further bilk plaintiffs at a 70¢ per ton and then 90¢ per ton for alleged "independent truckers" hauling of grit and gravel.

Plaintiffs charge that these efforts by defendants not only were intended to deceive the Court but were intended to further prejudice plaintiffs by increasing their expenses and their selling prices and thereby increasing defendants' competitive price advantage, and that Quadco should be joined as an additional defendant along with Lancaster Sanitary Landfill, Inc. as they are both

acting as co-conspirators with, and alter egos of, Pine Hill and defendants, and co-actors with them in attempting to monopolize, discriminate against and prejudice plaintiffs in competing in the ready-mixed concrete market.

E. It further appears that neither Pine Hill which operated and managed Quadco, nor Quadco itself, actually expended or sustained, or were entitled to, either 70¢ per ton or 90¢ per ton for delivery of materials, but that their actual expenses were substantially less and that Pine Hill profited therefrom, all in disregard of plaintiffs' 1949 Lease and Agreement with Pfohl Brothers which required Pine Hill to deliver the grit and gravel into plaintiffs' bins without any charge.

F. Defendant Regent Sand & Gravel Corp. is further granting rebates and discriminatory discounts

to Pine Hill because it also is operated by Pine Hill and pays Pine Hill a substantial amount for "administrative and operative expenses" which during most of the period involved was $7500.00 per month, or $90,000.00 per year (see Exhibit G, which was obtained during plaintiffs' initial discovery on December 18 and 19 of defendants' books. Pine Hill and Regent continue to refuse to allow plaintiffs to examine its books and records relating to their actual cost of production of the grit and gravel involved so as to determine a fair and non-discriminatory price therefor (assuming that defendants Regent and Pine Hill are entitled to continue to own plaintiffs' supply, and the same is not returned to plaintiffs as demanded in the complaint and in the amended and supplemental complaint).

28. During the entire period from 1949 to date, defendants have also attempted to monopolize the gravel sources, supplies and washing plants in the Buffalo-Western New York area. At the present time, the defendants have exclusive control of all commercially practicable gravel lands, deposits and washing plants in Erie County, excepting only the washing plants at the Clarence Ready-Mixed site (which company is almost completely out of concrete grit and gravel, and uses almost everything that is available for its own ready-mixed production), and Dan Gernatt in North Collins which is at the southern end of Erie County and about 43 miles from Lancaster.

29. Defendants acquired this stranglehold on the gravel supplies in the Western New York area beginning in 1951 when they bought out Genesee Sand and Gravel, which was followed by their purchase in 1954 of Buffalo Sand Company's Pavement Road Plant #1, their purchase in 1954 of Buffalo Sand Company's Sterling Plant #2 on Bills Road, followed by Pine Hill's purchse in 1957 of Pfohl Brothers Peppermint and Pavement Road washing plant and premises which serviced Frey's batching plant, and which was climaxed in 1968 by Pine Hill's purchase of 253 acres of gravel lands in Alexander, New York (which land butted and blocked Frey's Alexander, New York gravel plant; and which had no means of entrance or exit and was obviously purchased only for the purpose of curtailing and hindering plaintiffs' gravel supply and operations).

30. After making all of these gravel acquisitions, and obtaining almost a 100% monopoly of all of the commercially available gravel deposits and washing plants in the Buffalo area, defendants then began a course of conduct designed to utilize this grit and gravel monopoly to the detriment of their chief competitor Frey Concrete, Inc.

31. On February 6, 1968 defendant Pine Hill, in a transparently predatory offensive, made a tremendous and non-linear increase in the cost of grit and gravel to plaintiffs and refused to enter into discussions or negotiations with plaintiffs, or utilize the price determining machinery set forth in the Pfohl contract in relation to proposed price increases.

32. The extent and nature of defendants' non-linear price increase gave away their true motives. Defendants increased the price of grit almost 50% going from $2.20 per ton in 1967 to $3.20 in 1968, or an increase of $1.00 per ton, while at the same time only increasing the gravel 10¢ per ton from $2.40 and $2.20 per ton for No. 1 and 2 grit to $2.50 and $2.30 per ton.

33. Since concrete grit is a major essential component of concrete as to which there is little or no substitutability, and since plaintiffs were defendants' sole major customer for concrete grit, it appears clear that Pine Hill was tailoring

its price increase to disrupt plaintiffs' concrete business, but was at the same trying to retain defendants' normal gravel business with customers other than plaintiffs.

34. Defendants proved that they have the ability to manipulate grit and gravel prices in accordance with their desires. In 1974 they proposed to increase the gravel prices by 50¢ per ton but did not propose any increase in the grit prices -- because they admittedly were then trying to push the sale of grit by having plaintiffs resume their grit purchases (see Affidavit of Lois Muck, sworn to July 17, 1974 and Chart of comparing grit and gravel prices annexed thereto; and Affidavits of defendants' officials in support of the price increase).

35. At all times since they acquired the Pfohl Brothers gravel business and plaintiffs' gravel supply Lease and Agreement, washing plant, and source of gravel, plaintiffs have constantly refused to discuss prices or implement the price-determining machinery in the contract for concrete grit and gravel.

36. Defendants have unilaterally and arbitrarily fixed concrete grit and gravel prices without any regard to the market or defendants' production costs, and have all the while reaped the triple benefit of exorbitant profits on their grit and gravel sales to plaintiffs; of their greatly reduced cost of grit and gravel to themselves; and, of the profits made from sales to customers and to Frey's customers who switched to Pine Hill because of Frey's inordinately high price which was the

direct result of defendants' high prices.

37. Defendants have envisioned, planned and carried out a multiple assault on plaintiffs' business by: raising plaintiffs' costs of production; cutting defendants' own selling prices; financing defendants' reduced selling prices by their inordinate gravel profits; further financing defendants' low cost sales by using profits from fictitious alter egos such as Lancaster Sanitary Landfill, Quadco Hauling, Corp., Regent Sand & Gravel Corp., etc.; granting rebates and discounts to customers; granting free merchandise in the form of fill to customers; tying free fill to concrete purchases; acquiring an almost complete monopoly on gravel deposits and washing plants in the Buffalo area; acquiring a substantial number of competitors in the ready-mixed concrete business in the Buffalo area, including the customers of one of said companies; discriminating against plaintiffs in the delivery of the over-priced gravel; watering the gravel with as much as 5% excess water thereby effectively increasing prices by 5%; discriminating against plaintiffs by selling them unmarketable, defective, dirty, improperly graded and otherwise defective and undesirable grit and gravel; forcing plaintiffs to import gravel into the Buffalo area from far distant plants (approximately 43 miles); importuning plaintiffs' customers with depressed below-cost prices in the face of abnormal price increases of cement, fuel, materials and supplies, and "double digit" inflation which

defendants themselves cited to the Court in support of an increase in their gravel prices to plaintiffs; continuing to entice and keep customers from plaintiffs with promises of continuing in 1975 to adhere to said below-cost August, 1971 prices; and continuing to adhere to said August 1971 prices; and continuing to use them as a weapon and enticement to obtain the remainder of plaintiffs' customers.

38. The facts supporting the foregoing statements are set forth in this affidavit, and in the affidavits referred to herein, and in all of the affidavits which have been heretofore submitted to this Court, as well as in the depositions which have been taken by defendants of plaintiffs.

39. Unfortunately, plaintiffs have only had two days of discovery (December 18 and 19, 1974) of defendants' books and records and even then were only accorded limited access to certain books and records and after considerable waiting and wastage of time. Defendants refused to allow defendants further inspection, or inspection of all of the relevant and requested books and records and have now moved this Court for a stay of further discovery by plaintiffs.

40. Plaintiffs submit that, in two days of hindered, delayed and partial discovery of some limited books, that they were able to prove <u>without any question</u> that defendants are

subsidizing their below-cost sales by almost one-half million dollars from their related and alter ego companies, and that the grit and gravel prices they are attempting to charge plaintiffs, and the wrongful trucking charge they are trying to impose on plaintiffs, are unreasonably high and doubly profitable to defendants, since they not only caused an inevitable increase in plaintiffs' concrete prices, but financed defendants' lower prices. Defendants have thus placed plaintiffs in a vicious circle of higher costs of production and decreasing customers, with defendants as the direct and intended beneficiary thereof, by reason of their profits on the unreasonable prices and their increased profits from the customers taken from plaintiffs.

41. A full examination of defendants' records and depositions of defendants' officers will demonstrate even more clearly how vicious and how predatory has been defendants' assault on plaintiffs' business, its sources of supply, and its customers.

42. Defendants should be precluded from making this motion, and it should be denied, or at least deferred until plaintiffs have completed their discovery and can stand on an equal footing with defendants who have had complete discovery of plaintiffs' records and complete examination of its officers and personnel.

Supporting Affidavit of Lois Muck.

43. As we have previously told the Court, defendants' predatory actions caused us a loss of over $220,000.00 last year and we are continuing to operate this year on a loss basis. Defendants are living on the profits they are gathering from us from the artificially fixed and unreasonably high gravel and trucking prices, from the increased sales to the customers that they have been able to take away from us by reason thereof, and from the almost half-million dollar annual "below-cost" price subsidy which they are utilizing to finance their buccaneering attempt to drive us out of the ready-mixed business.

44. Defendants are entitled to have their landfill and trucking business, (they are also entitled to have a gravel business but they are specifically prohibited by the antitrust laws, and by the Pfohl Lease and Agreement from owning our gravel supply) but they are not entitled to use these businesses in a conspiratorial, concerted, predatory and monopolistic attempt to increase our prices, decrease our sales, and undercut our prices by sales far below their own actual cost.

45. When we commenced this action, we were only partially aware of the manner in which defendants were able to carry on this concerted and wrongful effort, and the full nature and extent of their activities. During the course of the litigation, during our continuing investigation, and most importantly during the two days of discovery, we have learned how defendants are financing this assault on our business.

Supporting Affidavit of Lois Muck.

46. After the long-delayed completion of their own discovery, and with a desire to prevent our discovery, defendants move the Court to stay any further discovery on our part and to dismiss our complaint. We think that this not only shows how fearful they are of this litigation, but further exemplifies their intent of utilizing the knowledge which they gained during the discovery of our weakened financial position to maintain and increase their efforts to drive us out of business. The fact that they are continuing their $22.00 per yard price, even in the face of their increases in raw materials prices thus far this year, especially when coupled with their rebate policy of $2.00 per yard, demonstrates the competitive disadvantage they are able to maintain of up to $5.00 per yard of concrete.

47. We cannot finance loss sales even at $25.00 per yard but they are able to subsidize their loss sales at $22.00 per yard. Pine Hill can do this because their volume of 150,000 yards, is subsidized by almost $500,000.00 per year, and further made feasible by the increased volume they obtained from our customers by utilizing the below-cost price to begin with.

Supporting Affidavit of Lois Muck.

48. These facts are more fully set forth in the amended and supplemental complaint which we are asking leave of this Court to serve and we are confident they will be further demonstrated by the examination of defendants' books by us and by our accountants; and that defendants' motions to dismiss this case now that we have started our discovery and in two partial days of limited examination have made such amazing revelations of their financial strategy and assault, demonstrates both defendants fear and their bad faith in dealing with us in what was clearly understood to be a mutual exchange of information on the discovery so as not to constitute a competitive disadvantage to either side.

Lois Muck

Lois Muck

Sworn to before me this
7th day of March, 1975.

[illegible]
Notary Public, State of [illegible]
Qualified in this County
My Commission Expires March 30, 19[illegible]

522a
Supporting Affidavit of Lois Muck.

PHONE: REgent 1432

GEORGE C. FREY
Batching Plant, Inc.
5393 WILLIAM STREET - LANCASTER, N. Y.

September 3, 1953

Pfohl Bros., Inc.,
Pfohl Road,
Cheektowaga, N. Y.

Gentlemen:

This is to confirm our agreement and understanding of August 19, 1953.

It is understood and agreed that although prices for materials delivered and sold by you to George C. Frey Batching Plant, Inc., are ordinarily adjusted on April 1st of each year, that your costs and expenses may make it necessary to increase your price to other customers. Therefore, it is agreed that if you increase the price of materials sold to all other buyers by 10¢ per ton or more George C. Frey Batching Plant, Inc. will pay you 5¢ per tone more than it is paying as of the above date.

This agreement shall become effective upon your giving us notice of the effective date of the aforementioned price rise to other buyers.

If you raise the price to other buyers by any sum less than the aforementioned 10¢ per ton, than this agreement is null and void and negotiations will be renewed for any price increase to be paid by us.

Very truly yours,

GEORGE C. FREY BATCHING PLANT, INC.

By: George C. Frey Pres
GEORGE C. FREY, President.

EXHIBIT A

R. 72

522b
Supporting Affidavit of Lois Muck.

OPTION AGREEMENT

THIS AGREEMENT, made this 14 day of Oct
1957, by and between JOSEPH PUCH, 20 Underhill Road, Cheektowaga, New York, PAUL PUCH, 250 Pfohl Road, Cheektowaga, New York, and VIRGIL PUCH, 205 Drexmere Road, Depew, New York, parties of the first part, hereinafter collectively called Sellers, and PINE HILL CONCRETE MIX CORPORATION, a New York corporation with its principal office and place of business at 2255 Bailey Avenue, Buffalo, New York, party of the second part, hereinafter called the Purchaser.

WHEREAS, the Sellers are the owners of all of the issued and outstanding capital stock of PUCH BROS., INC., a New York corporation with its principal office and place of business at 264 Pfohl Road, Cheektowaga, New York, and

WHEREAS, the Sellers desire to sell, and the Purchaser desires to receive, an option to purchase all of the issued and outstanding capital stock of PUCH BROS., INC., upon the terms and conditions as hereinafter set forth:

NOW THEREFORE, THIS AGREEMENT, WITNESSETH: That for and in consideration of the sum of Five Thousand Dollars ($5,000.00), in hand paid to the Sellers, the Sellers hereby grant and sell to the Purchaser, its successors and assigns, the exclusive right and option to purchase all of the issued and outstanding stock of PUCH BROS., INC., for the sum of One Million, Seven Hundred Fifty Thousand Dollars ($1,750,000.00), payable as hereinafter provided and on the terms and conditions as hereinafter specified.

The option may be exercised by the Purchaser at any time after April 1, 1958, and prior to December 31, 1958

EXHIBIT B

Supporting Affidavit of Lois Muck.

All rights and privileges under this option shall expire at 5:00 o'clock P.M. on December 1st, 1967.

(B) In the event that the Purchaser does not exercise the option as herein provided, the said sum of Five Thousand Dollars ($5,000.00) paid to the Sellers for this option shall be retained by the Sellers, free of all claims of the Purchaser, and neither party shall have any further rights or claim against the other. However, in the event the option is exercised by the Purchaser, the Five Thousand Dollars ($5,000.00) paid to the Sellers shall be applied upon the purchase price.

This option shall be exercised by the Purchaser by a written notice subscribed by the Purchaser and either sent by registered mail, postage prepaid, to 145 Pfohl Road, Cheektowaga, New York, and mailed within the time set herein for the exercise of this option, or delivered personally to anyone of the Sellers within said time, and by making a payment on account of the purchase price of the sum of Fifty Thousand Dollars ($50,000.00).

(C) In the event that the Purchaser exercises this option, this agreement shall be deemed to constitute a contract of sale, and all of the terms and provisions hereinafter set forth shall apply to such sale and shall be binding upon the respective parties, their executors, administrators, distributees, successors and assigns.

1. The sale shall be completed within thirty days after the exercise of the option and the sale shall be closed at the office of Hurwitz & Fink, Attorneys for the Seller, unless the parties hereto may specify in writing.

[illegible] Million seven hundred

Supporting Affidavit of Lois Muck.

option and for the option, plus such amount, if any, as shall represent the excess over Three Hundred Thousand Dollars ($300,000.00) of the book value of the said assets (such as tory of supplies, inventory of [illegible] processed [illegible] inventoried value as $1.00 per ton, accounts receivable and prepaid items), less the current liabilities (as shown [illegible] and reserve for accrued taxes on current income), which sum however, shall not exceed Five Hundred Sixty-five Thousand Dollars ($565,000.00). The balance of the purchase price to be represented by a promissory note executed by [illegible] CHEMB MIT CORPORATION as maker, which promissory note shall be payable in sixty equal proportionate monthly installments, commencing one month after closing, with interest on all sums from time to time remaining unpaid, at the rate of 8% per annum payable monthly, except as hereinafter provided: If the down payment, plus the note payments, in the year of closing, as above, should exceed Five Hundred Twenty-Five Thousand ($525,000.00), then the note payments due during the year of closing shall be [illegible], so that all such payments due in that year represent the rateable portion of the difference between the down payment and Five Hundred Twenty-Five Thousand Dollars ($525,000.00). Should the down payment be Five Hundred Twenty-Five Thousand Dollars ($525,000.00), the monthly note payments shall begin on the 25th day of January, following the date of closing. The balance of the note payments due each month due on and after the first day of January following the [illegible]

that event, then the note payments due or to become due on and after the first day of January following the closing shall be equal proportionate monthly payments of the remainder of the purchase price, less the excess over Five Hundred Twenty-Five Thousand Dollars ($525,000.00), that the down payment would have been, except for the limitation, and the specified excess shall be added to the first note payment due in the year following the year of closing.

Said note may be prepaid in whole or in part, provided that the total payments paid by the Purchaser in the year of 1956 (including cash on closing and note installments), shall not exceed the sum of Five Hundred Twenty-Five Thousand Dollars ($525,000.00), unless the Purchaser shall pay the entire amount of said note and any prepayment shall be applied to the installments of the note in the inverse order of their maturity.

In the event that the Purchaser borrows money from the Manufacturers & Traders Trust Company on a promissory note and said Manufacturers & Traders Trust Company should so demand, the Sellers agree to subordinate the aforesaid note to the note or notes given to the Manufacturers & Traders Trust Company.

(insert) All of the issued and outstanding capital stock of PFOHL BROS., INC. and STAGE FARMS, INC. shall be pledged with Stanley H. Montfort, attorney, as collateral security for the payment of said note, and the said Stanley H. Montfort shall agree to hold said stock as collateral security for the payment of the said note in accordance with the provisions of this agreement and of the note.

3. The Sellers represent that PFOHL, BROS., INC. is a corporation duly and legally incorporated under the laws of the State of New York, and that all of the issued and outstanding stock is owned by the Sellers, and that they have a right to sell and convey the said stock. The Sellers have submitted to the Purchaser a financial statement of PFOHL BROS., INC., as of June 30, 1956, a copy of which is attached hereto and made a part hereof, and the Sellers represent that said financial statement fully and fairly sets forth the assets, liabilities and financial

condition of the corporation as of that date, and that said financial statements were prepared in conformity with generally accepted accounting principals applied on a basis consistent with preceding years, and that there have been no changes in said statements since that date, except in the ordinary and customary course of business.

4. That the books of the corporation correctly show all of the liabilities of the corporation, and that there are no liabilities contingent or otherwise, other than are shown on the books and records of the corporation and which are reflected in the financial statements above referred to.

5. That all tax returns required by the federal government have been duly filed by [illegible], and that all tax returns required by the State of New York have also been duly filed, and that all taxes, levies and duties have been duly paid at their due dates. The Sellers represent that there will be no additional income tax, franchise tax, or other taxes due to the Federal government or any state government, other than as shown by the books of the corporation and by the tax returns filed, except taxes for the current fiscal year, which returns and payments are not due as of the date of this agreement. The Sellers further represent that proper and adequate reserves for current taxes accruing but not payable have been set up on the books of the corporation. In the event that on any examination, the Federal or state government assessed any additional income tax, franchise tax, or other tax for any year other than the current fiscal year, the Sellers will pay and discharge such additional taxes, subject however, to their right of contesting, at their own expense, the validity or correctness of any such additional income tax, franchise tax or other taxes.

Supporting Affidavit of Lois Muck.

6. The Sellers further represent that there are no pending suits or claims against PFOHL BROS., INC., and that as far as the Sellers know, or have reason to believe, none are anticipated, and there is no basis for any claims or suit.

7. The Sellers represent that PFOHL BROS., INC. has good and marketable title to all of its property and assets of every kind, nature and description, and that the same have been fully paid for and are not subject to any liens of any kind or nature, other than as shown on the books of the said corporation and reflected in the financial statements submitted to the Purchaser.

8. In the event that the option is exercised, then at the closing of the transaction, the Sellers will present stock certificates representing all of the issued and outstanding capital stock of PFOHL BROS., INC., which stock certificates shall be endorsed in blank, and requisite stock transfer stamps shall be affixed, and on the closing of the transaction, the stock shall be transferred into the name of the Purchaser, and then said stock, endorsed in blank, shall be pledged as collateral security for the payment of the note as hereinbefore specified.

9. The Sellers represent that until this option expires or the transaction is closed, that the business of PFOHL BROS., INC. will be continued in the ordinary and customary manner; that all of the equipment will be maintained in good repair and condition as has been the custom of the corporation prior to the date of this agreement, and that said equipment will be insured with the coverage that is normally maintained on property of this type; that no new contracts of employment will be entered into without the consent of the Purchaser, nor will any sales or purchase commitments be made other than in the ordinary course of business; that no dividends will be paid upon

the stock; that no salaries or bonuses of executive officers will be increased over the amount provided for prior to the date of this agreement, it being understood, however, that the corporation, PROVIL [illegible], INC. may purchase additional properties and securities as shall be deemed by it to be in the best interest of the corporation, and also PROVIL [illegible], INC. shall pay the Christmas bonuses in the same manner and consistent with amounts which have been the custom in previous years.

10. The Sellers further agree that on the closing of this agreement, there shall be presented to the Purchaser the written resignations of all the officers and Directors of PROVIL [illegible], INC.

11. In the event that this transaction is closed and the note referred to in paragraph "8" is delivered by the Purchaser to the Sellers, the Purchaser agrees that said note shall contain the following specific provisions:

(a) That all of the stock of PROVIL [illegible], INC. and PROVIL [illegible], INC. will be pledged with Sterling [illegible], escrow, as collateral [illegible]

(b) That presently operating assignments and balances sheets of PROVIL [illegible], INC., [illegible] PROVIL, INC. and/or any corporation or corporations which control title to the assets of PROVIL [illegible], INC. and PROVIL [illegible], INC., will be furnished to the Sellers, all certified to by experienced financial officers, and also an annual profit and loss statement of the business [illegible] prepared by a C.P.A. will be submitted to the Sellers.

(c) That PROVIL [illegible], INC., PROVIL [illegible], INC. and/or any and [illegible] or corporations which control title to the assets of PROVIL [illegible], INC. and PROVIL [illegible], INC. will furnish to the Sellers each other annual [illegible] regarding the business affairs as the Sellers may reasonably request.

(d) That PROVIL [illegible], INC., PROVIL [illegible], INC. and/or any corporation or corporations which control title to the assets of PROVIL [illegible], INC. and PROVIL [illegible], INC. will promptly pay all taxes, assessments and all other governmental charges, provided however, that Purchaser [illegible] shall be [illegible] required to pay [illegible] of any tax so long as its validity is fully contested in good faith.

(e) That PROVIL [illegible], INC., PROVIL [illegible], INC. and/or any corporation or corporations which control title to the assets of PROVIL [illegible], INC. and PROVIL [illegible], INC. will keep all of the insurable property insured at all

times with responsible insurance carriers against fire, and other hazards, in such manner and to the extent that like property is usually insured by others operating property of similar character in the same locality.

(f) That PFOHL BROS., INC., STAGE FARMS, INC. and/or any corporation or corporations which acquire title to the assets of PFOHL BROS., INC. and STAGE FARMS, INC. will not pay or declare any dividends except stock dividends on its capital stock without the consent of the Sellers.

(g) That PFOHL BROS., INC., STAGE FARMS, INC. and/or any corporation or corporations which acquire title to the assets of PFOHL BROS., INC. and STAGE FARMS, INC. will not become a guarantor, surety or otherwise become liable for the debts or obligations of any person, firm or corporation, nor will PFOHL BROS., INC., STAGE FARMS, INC. and/or any corporation or corporations which acquire title to the assets of PFOHL BROS., INC. and/or STAGE FARMS, INC. loan or advance any money to its officers, employees or stockholders, in excess of Two Thousand Dollars ($2,000.00) at any time. Nothing herein contained shall be construed to prevent any loan or advance if the total amount of such loan or advance shall be paid to the Sellers to apply upon the note referred to in paragraph "2".

(h) That PFOHL BROS., INC., STAGE FARMS, INC. and/or any corporation or corporations which acquire title to the assets of PFOHL BROS., INC. and STAGE FARMS, INC. will not, without the written consent of the Sellers, pay any salary or compensation to LESLIE HAHLE as an executive officer of PFOHL BROS., INC. or STAGE FARMS, INC., nor will said corporations pay any salary or compensation to any officer, agent, director, employee and/or stockholder, other than a reasonable amount for services rendered. Nothing herein contained shall be construed to prevent any loan or advance if the total amount of such loan or advance shall be paid to the Sellers to apply upon the note referred to in paragraph "2".

(i) That PFOHL BROS., INC. and or STAGE FARMS, INC. will not convey, lease or sell all or any part of its property, assets or business without the written consent of the Sellers, provided however, that this shall not be construed to prevent the liquidation, merger or consolidation into any other corporation that is controlled to at least 90% by the Purchaser, if the resulting corporation or corporations which acquire title to the said assets shall assume the obligations for the payment of the note in accordance with the provisions of this agreement.

" It is mutually agreed that said note shall be in such form as shall be satisfactory to the attorney for the Sellers, and shall contain the provision that the failure to make any payment of principal and interest on its due date, or within ten days thereafter, or the failure to comply with any covenant or condition of said note shall make said note, at the option of the holder or holders thereof, immediately become due and payable on demand.

Supporting Affidavit of Lois Muck.

It is mutually agreed that the said note shall provide that installment payments on said note may be suspended in the event that there is an industry-wide carrier embargo for a period of 45 days, and said payments shall be suspended until the termination of said period. It is further agreed that installment payments may be suspended during the period of any national emergency, such as riot, insurrection, war in the continental United States, or act of God, or any other catastrophe not due to any default or neglect of the purchaser, PUCHL ENGR., INC., STAGE FARMS, INC. and/or any corporation or corporations which acquire title to the assets of STAGE FARMS, INC. and PUCHL ENGR., INC., and such payments shall be suspended during the continuance of such riot, insurrection, war or act of God or other catastrophe, provided however, that all suspended payments shall be due in monthly installments following the date of the last installment as herein provided, and further provided that as to all suspended payments to not the normal due date, that shall be [illegible] the rate of 4%, instead of 2%, as hereinbefore provided.

It is mutually agreed that in the event that this option is exercised and the transaction closed, the Purchaser agrees that, within one year after the closing of the [illegible] to take or cause to be taken, appropriate proceedings (including the filing of necessary certificates in the office of the Secretary of State of the State of New York) to change the name of the corporation, PUCHL ENGR., INC., to some other name that does not contain the name, "PUCHL", and further agrees to not thereafter use the name "PUCHL" or "PUCHL ENGR."

Purchaser will incorporate or cause to be incorporated. In the event that the Purchaser elects to incorporate one or more corporations and to cause PFOHL BROS., INC. and/or STAGE PARTS, INC. to be dissolved, the Sellers consent that the capital stock of PFOHL BROS., INC. and/or STAGE PARTS, INC. may be released from the pledge as collateral security for the note hereinbefore referred to, provided however, that contemporaneously with the release of said stock pledged as collateral security, that there be substituted therefor, all of the issued and outstanding capital stock of the corporation or corporations which caused title to the assets of PFOHL BROS., INC. and/or STAGE PARTS, INC. It is the intention of the parties that there shall be pledged as collateral security for the note hereinbefore referred to, all of the issued and outstanding stock of each and every corporation which owns any part of the assets held by PFOHL BROS., INC. and/or STAGE PARTS, INC. at the time of the closing of this transaction. It is mutually agreed that the Sellers, as holders of the promissory note hereinbefore referred to, may, at their election, cause any part or all of any stock pledged as collateral security for the said note to be transferred into the name or names of a nominee or nominees of the Sellers, and that the Sellers may, at their election, have a nominee as an officer and director of any corporation, the stock of which is pledged as collateral security for the said note, said officer and director to serve without salary or compensation.

In the event that this option is exercised, the [illegible] prior thereto to the closing of the

and Screening Plant, the Co-Ordinated Belt Conveyor, the 2010 Atco Car Dismal Track, the 1910 Link Belt Shovel, the real property as fully described in the form of Warranty Deed from [illegible] to Muck, the said property in the form of Warranty Deed from [illegible] to Muck, 26.40 shares of the capital stock of Muck Farms, Inc. The said properties shall be conveyed to Muck Enterprises, Inc., free and clear of all liens and encumbrances of any kind or nature except taxes for the current year, which are not due as of the date of said conveyance. The failure to make such payment at the time of the closing of this transaction to permit Muck Enterprises to obtain title to offices and directors of Muck Farms, Inc.

19. It is understood and agreed that certain property in the form of interest to be owned by the Muck's as copartners to the extent of a one-half undivided interest, and that [illegible] Muck to the other of the other one-half interest in said property, said property being described in a certain agreement dated [illegible] 1, 1959, between Charles G. Muck, as party of the first part, [illegible] agreement is recorded in the Office of the Clerk of the County of Erie in Liber 4010 of Deeds at page 306, and that said agreement provides that if either party to said agreement desires to sell or dispose of the interest in said properties, that the party must first offer to sell to the other party concerned, at the price to be the book value, plus ten per cent. The remedy of the first party where that in the event that said option is exercised, to the said premises of Charles G. Muck to convey properties to be Muck Enterprises, Inc. as paid in capital to the extent that the said Charles G. Muck should decline to give his permission to such conveyance, then upon the consummation of the transaction in accordance with the terms of herein agreement the [illegible] of the first part will receive [illegible]

receivable for materials excavated from said properties. In the event that the properties remain in the name of the Sellers, after the closing of the transaction, the Purchaser hereby agrees to indemnify and hold harmless the sellers from any and all claims and demands of any kind or nature and will carry a public liability policy in the amount of $100,000.00 covering said property, with the Sellers as one of the insureds, and will furnish a certificate to the Sellers as to such liability policy. All rights to dig gravel from the said properties shall be conveyed to FROM ENG., INC., without cost.

It is mutually understood and agreed that the Sellers have a certain claim against the State of New York for damages for appropriation of a part of the properties described in this paragraph by the State of New York, and said claim is retained by the Sellers, and the property and rights as referred to in this paragraph shall mean only the balance of said properties not taken by the State of New York condemnation proceedings.

14. It is mutually understood and agreed that the install ment payments on the note referred to in paragraph "2" are based on the assumption that FROM ENG., INC. and/or STACO FARMS, INC. or any other person, firm or corporation which acquires title to any part or all of the properties involved will not excavate, use, dig and/or remove from said properties sand, grit and gravel exceeding the sum of 200,000 tons annually, or 25,000 tons monthly, and the Purchaser hereunder agrees that there shall be submitted when requested to the Sellers monthly reports, containing daily truck loadings and weights per load, as to all sand, grit and gravel excavated, used and/or removed from the properties

Supporting Affidavit of Lois Muck.

held by PFOHL BROS., INC., STAGG PARK, INC. and/or any corporation which shall acquire title to any of the said properties, and the Purchaser shall certify to the correctness of said monthly statements. In the event that there is excavated, used and/or removed in any one month more than 25,000 tons, then the payment due the succeeding month shall be increased by a sum equal to One Dollar ($1.00) for each ton in excess of 25,000 tons. It is understood and agreed that any deficiency in any one month may be carried forward to succeeding months to determine whether the digging and excavation of said,

Continued on page 10.

[illegible] and gravel in excess of the monthly rate of $5,000 [illegible].

It is further understood and agreed that for the purpose of [illegible] the computation as provided in this paragraph of the said [illegible] and gravel shall be excavated and [illegible] that there shall be taken into account only fifty per cent of the tonnage on the properties owned by [illegible] and only twenty-five per cent of the tonnage on the properties described as the Lemaster sand and gravel properties. As to all other properties, one hundred per cent of the tonnage shall be taken into account.

It is further mutually understood and agreed that the [illegible] shall have the right at any time to [illegible] any of the properties owned by [illegible] and [illegible] any corporation or corporations which shall acquire title to any of the properties involved for the purpose of [illegible], and to determine the correctness of the computation as to the number of tons of sand, gold and gravel excavated or mined from said properties.

It is further mutually understood and agreed that [illegible] on the rate are suspended or deferred, then, notwithstanding the suspension or deferment, a royalty payment shall be due to the [illegible] on the said rate of not less than $1.00 per ton for each ton of sand, gold and gravel excavated and carried during the period [illegible] from the properties referred to in this agreement or owned or leased by [illegible], and [illegible] any corporation which acquires title to any of the said properties involved. In the event that the payments due to the [illegible] under the provisions of this paragraph, added to all other payments required to be made to the [illegible] should increase the annual [illegible]

rights on property leased or owned by any one of the aforesaid corporations.

15. It is mutually understood and agreed that the Purchaser may, from time to time, make application to the C[illegible] to release a part of the stock pledged as security for the [illegible] of the note referred to in paragraph "G", and the Sellers [illegible] that they will, from time to time, release a part of the [illegible] stock held as security for the payment of the note, provided however, that the Sellers are entitled that the remainder of the stock pledged as collateral is always security for the payment of the balance of the said note.

16. It is understood by the parties that a cert[illegible] part of the Pepperidge Road property has been appropriated by the United States Government for the installation of a [illegible] or some other military purpose, and that an award or settl[illegible] will be made by the United States Government as compensation for the taking of said property, and the Purchaser hereby [illegible] that, upon the payment of any award or settlement for the [illegible] of said property (provided said payment or settlement is made subsequent to the closing of this transaction) that the amount thereof shall be paid to the Sellers on a prepayment on the note referred to in paragraph "G" of this agreement.

17. It is understood that, at the closing of the [illegible] option agreement, dated March 1[illegible] by and between [illegible] a preliminary note or letter [illegible] [illegible] shall be delivered [illegible]

Supporting Affidavit of Lois Muck.

20. [illegible] [illegible] [illegible]

JOSEPH PFOHL will hold the same as nominee of PFOHL BROS., INC., and will take proceedings for transfer of the same only as directed by the Purchaser.

It is further understood and agreed that the Sellers are the owners of certain stock in JAMESON BANK [illegible] and, in the event that the option is exercised, then, on or prior to the closing of the transaction, the Sellers agree to assign and transfer said stock to PFOHL BROS., INC., and to accept in payment therefor the cost price of said stock, which cost price is the sum of Four Thousand Dollars ($4,000.00).

19. It is mutually agreed that in the event that this option is exercised, then on or prior to the closing of the transaction, the Sellers shall have the right to purchase for cash from PFOHL BROS., INC. at the depreciated book value the following items of machinery and equipment: Two 1955 Cadillac automobiles. One 1954 Cadillac automobile, all office furniture and equipment. One D-7 bulldozer with special blade.

The Sellers shall also have the right to purchase from PFOHL BROS., INC. for cash at the cash surrender value, the life insurance policies on the lives of anyone or all of the Sellers and owned by the corporation.

20. It is mutually agreed that from and after the signing of this option agreement, the Purchaser shall have a period of sixty days from the date of the signing of this agreement to determine the correctness of the representations made by the Sellers about PFOHL BROS., their net worth and marketable title to real and personal property of every kind, nature and description [illegible]

on the basis of [illegible], Inc. After the Purchaser shall
a period of sixty days from and after the signing of this
ment to determine the correctness of the Sellers' repre
that they have good and marketable title to the prope
ments to be conveyed to [illegible], Inc., prior to
of the consideration as hereinbefore provided. During
of said sixty days, the Purchaser, his agents, attorn
representatives, shall have full access to the plans of pro
ments [illegible], Inc., and may check [illegible], Inc.'s re
and the Sellers shall make available to the Purchaser, f
copy of [illegible] documents, title searches and surveys of the
respective properties. Purchaser shall be deemed to have
any alleged title defects or objections to the title of
provided, unless the Purchaser shall notify Sellers in writing
concerning the same within the said sixty-day period. In the
event that the title to any properties is not good and mark
because of such alleged defects or objections, Sellers shall
the right to give written notice to Purchaser of the cancella
of this option, in which event this option shall become null and
void, provided however, that (a) if the Purchaser, within ten
after receipt of such notice of cancellation, shall give writt
notice to Sellers of Purchaser's election to take title subject
to such alleged defects or objections, or (b) if a title in
policy acceptable to the Purchaser can be obtained at ordi
rates said option shall remain in full force and effect. In
event of the cancellation of said option as provided for in
ne agraph, Sellers shall repay to the Purchaser all monies p
under said option agreement and thereupon said option agreement
shall become null and void. In the event that title insurance
obtainable as provided for in this paragraph, [illegible], Inc.
shall pay the cost thereof. Any notice or notices by the Pur

Supporting Affidavit of Lois Muck.

under the provisions of this paragraph shall not be deemed to be an exercise of the option. Notwithstanding the foregoing, Purchaser shall not be obligated to [illegible] this option shall not be subject to any limitation by contract or otherwise of any title defects or objections to title existing at the time of any of the failure of the Seller to [illegible] from any sub sequent to the date of the [illegible]

11. The Purchaser shall not have any right to [illegible] or terminate this option agreement without the written consent of the Sellers, to be endorsed on or attached hereto, and it is understood that this option is granted only to the Purchaser herein named.

12. The Purchaser shall be granted full access to the plant or plants of PROW PROD., INC. and to the books and records of PROW PROD., INC., and the Purchaser, by its [illegible] attorneys and accountants, shall make such [illegible] prior to the closing of the transaction, as he deems advisable to determine the correctness of the representations made by the Sellers. In the event that the Purchaser determines that any of the representations made by the Sellers are inaccurate in a substantial manner, the Purchaser shall notify the Sellers in writing specifying the representations which he deems to be inaccurate and thereupon the Sellers shall have the right and option (a) to take such steps and perform such actions as are for the alteration of the representations particularly set forth upon the examination shall be placed in position in the plants or (b) to cancel and terminate this agreement and return [illegible]

Supporting Affidavit of Lois Muck.

Supporting Affidavit of Lois Muck.

STATE OF NEW YORK :
COUNTY OF ERIE : ss.
CITY OF BUFFALO :

On this 18th day of October, 1927, before me personally came and appeared [illegible], to me known and known to me to be the [illegible] described in and who executed the foregoing [illegible] and duly acknowledged to me that they executed the same.

[illegible]

STATE OF NEW YORK :
COUNTY OF ERIE : ss.
CITY OF BUFFALO :

On this 18th day of October, 1927, before me personally came LUDWIG MAHLE, to me known, who, being by me duly sworn, did depose and say that he resides at No. [illegible] Buffalo, New York, that he is the President of [illegible] CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[illegible]

522w

Supporting Affidavit of Lois Muck.

EUGENE S. HUTCHINSON
No. 6 Lee Terrace
Williamsville 21, N. Y.

Plaza 9000

October 6, 1956

Mr. Paul Pfohl, President
Pfohl Brothers, Inc.
Pfohl Road
Cheektowaga 25, New York

Dear Mr. Pfohl:

I have audited the accounts of Pfohl Brothers, Inc. for the six months period ended June 30, 1956 and submit the following exhibits:

EXHIBITS

A - BALANCE SHEET - JUNE 30, 1956

B - INCOME STATEMENT FOR THE SIX MONTHS ENDED JUNE 30, 1956

C - STATEMENT OF RETAINED EARNINGS FOR THE SIX MONTHS ENDED JUNE 30, 1956

My examination of the financial records of Pfohl Brothers, Inc. was made for the purpose of furnishing the management with a financial report as at June 30, 1956, and the results of its operations for the six months period then ended as shown by the books of account. The audit did not attempt to determine the character or quality of service rendered or merchandise supplied during the period audited; such details are necessarily covered by your acceptance and payment of vendor's claims.

At the close of the corporation's fiscal year December 31, I make an examination sufficient in scope to permit the expression of an opinion as to the reliability of the financial statements. At more nearly intervals during the remainder of the year I make partial examinations and submit reports as desired by the management. It is not practical to perform all of the auditing procedures necessary for the expression of an opinion at such intervals during the year. Accordingly, my work in these partial examinations is confined to such tests of the accounting transactions as will constitute an over-all annual audit program.

The scope of my work on this interim examination did not include all the normal audit verifications of assets and liabilities. However, nothing has come to my attention which would indicate that the financial statements submitted herewith do not fairly reflect the financial condition and the results of operations. Nevertheless, in view of the materiality of the items with respect to which, normal auditing procedures were omitted during this examination, I am unable to express an independent accountant's opinion on the fairness of the over-all representations contained herein.

Respectfully submitted,

Supporting Affidavit of Lois Muck.

CURRENT ASSETS

Cash on hand and in banks	
Accounts receivable-trade (less allowance for doubtful accounts $ 13 876.44	
Inventory - materials and supplies (cost) (Note A)	
Deferred charges	
Total Current Assets	

FIXED ASSETS

Land	
Building	
Sand and gravel deposits	
Machinery and equipment	
Furniture and fixtures	
Automotive equipment	
Scale	
Total	
Less: Accumulated depreciation and depletion	
Net Fixed Assets	

OTHER ASSETS

Notes receivable - long term	$ 85 700.00
Securities (cost)	
Cash surrender value - officers' life insurance	
Deposits	
Total Other Assets	
TOTAL ASSETS	

NOTE A: Inventory quantities as submitted by management were priced by the auditor.

Supporting Affidavit of Lois Muck.

EXHIBIT A - continued

LIABILITIES AND CAPITAL

CURRENT LIABILITIES

Notes payable	$ 21 362.00
Accounts payable - trade	68 836.59
Accrued wages	2 640.49
Payroll taxes due and payable	3 921.01
Federal income and state franchise taxes payable	21 542.47
Total Current Liabilities	$ 148 306.56

CAPITAL

Common stock authorized and issued 99 shares no par value	$ 31 469.28
Retained earnings (Exhibit C)	454 793.09
Total Capital	$ 486 276.37
TOTAL LIABILITIES AND CAPITAL	$ 634 582.93

Supporting Affidavit of Lois Muck.

PEOPL PRODUCTS, INC.

INCOME STATEMENT

FOR THE SIX [illegible] 30, 1956

GROSS SALES		0 [illegible]
COST OF SALES		
Inventory - January 1, 1956	0	[illegible]
Salaries and wages		[illegible]
Rent		[illegible]
Packing		[illegible]
Maintenance and repairs		[illegible]
Depreciation - Equipment (Packing Plant and P&C)		[illegible]
Depletion - cost		[illegible]
Total		[illegible]
Less Inventory - June 30, 1956		[illegible]
Cost of Sales		[illegible]
GROSS PROFIT ON SALES		[illegible]
OPERATING EXPENSES		
Officers' salaries	0	[illegible]
Other salaries and wages		[illegible]
Rent		[illegible]
Advertising		[illegible]
Travel and entertainment		[illegible]
Office expense		[illegible]
Telephone		[illegible]
Insurance		[illegible]
Legal, accounting and collection		[illegible]
General auto and truck expense		[illegible]
Taxes - payroll		[illegible]
Taxes - other		[illegible]
Contributions		[illegible]
Miscellaneous expense		[illegible]
Other depreciation		[illegible]
		[illegible]
OPERATING PROFIT		0 [illegible]
ADD OTHER INCOME		[illegible]
GROSS INCOME		0 [illegible]
DEDUCT OTHER EXPENSE - Sales Discounts		[illegible]
[illegible]		0 [illegible]
[illegible] FOR FEDERAL INCOME TAX		[illegible]
[illegible]		[illegible]

Supporting Affidavit of Lois Muck.

EXHIBIT

PECK BROTHERS, INC.

STATEMENT OF RETAINED EARNINGS
FOR [illegible] ENDED DECEMBER 30, 1955

RETAINED EARNINGS - January 1, 1955	$ 402 733.05
ADJUSTMENTS - PRIOR YEAR Reduced Excess deposit to tax basis	5 550.07
ADJUSTED RETAINED EARNINGS - January 1, 1955	$ 397 183.02
ADDITIONS:	
Net profit (Exhibit B) Increase Cash value Life Insurance	57 760.71 [illegible]
TOTAL RETAINED EARNINGS	$ 455 307.73
DEDUCTIONS:	
Collected Life insurance proceeds	5[illegible]
RETAINED EARNINGS - Dec 30, 1955 (Exhibit A)	$ 451 [illegible].09

522bb

Supporting Affidavit of Lois Muck.

September 11. 1974

Lancaster Sanitary Landfill Inc

2255 Bailey Ave

Buffalo, New York 14211

August -	Rental of 623 Cat Scraper —	176 hours @ 26.00	$ 4.576.00
	Rental of D-8 H#2 Bulldozer —	123 hours @ 25.00	3.075.00
	Rental of D-8 H #3 Bulldozer —	176 hours @ 25.00	4.400.00
	Rental of K-360 Link Belt Shovel —	39 hours @ 24.00	936.00
	Mack - Water Truck —	$175.00 per month	175.00
	Diesel Fuel & Servicing -	3850 Gals @ .52	2.002.00
	Cover Material - Solid Waste -	81,600 cu. yds. @ .0525	4.284.00
			$ 19.448.00

9/12/73	[illegible]
9/1/72	11,537.50
9/1/71	10,[illegible]7.50
9/31/70	13.418.50
7/1/69	10.223.50
7/31/68	4.[illegible]3.50

EXHIBIT C

522cc

Supporting Affidavit of Lois Muck.

Sept. 11. 1974

Lancaster Sanitary Land Fill
2255 Bailey Ave
Buffalo. New York 14211

Rental of land for refuse materials disposal for
the month of August. 1974 per lease with Pine
Hill Concrete Mix Corporation

Dated 11/1/61 $900.00

S. J 16.

EXHIBIT D

522dd

Supporting Affidavit of Lois Muck.

06129

Lancaster Sanitary Landfill, Inc
2255 Bailey Ave
Buffalo. N.Y 14211

For administrative and operative expenses for month of Aug. 1974

$4,600.00

L J.
32

EXHIBIT E

522ee

Supporting Affidavit of Lois Muck.

September 11, 1974

Lancaster Sanitary Landfill Inc
2255 Baily Ave
Buffalo, N.Y. 14211

Salarys for the following for the month of August 1974:

J. W. Frey Jr.	$1,110.00
John Kohorst	1,625.00
Total	2,735.00
Plus 30% fringe benefits + Payroll expense	820.50
Total	$3,555.50

Salary for the following for the month of August 74':

R. Lorenzi	$ 546.00
J. Myers	440.00
D. Tomczak	1119.63
Total	2105.63
Plus 20% fringe benefits + payroll expense	421.13
Total	2,526.76

Miscellaneous Labor for the Month of August 1974:
Chapman, Lewczyk, Morin, Trzybinski
451 Hours @ 9.32 per hour $4.158.22
Plus 40% fringe benefits + payroll expense 1,663.29
Total 5,821.51

Grand Total $ 11,903 77

EXHIBIT F

Supporting Affidavit of Lois Muck.

06128

Sept 10. 1974

Regent Sand + Gravel Coy.
2255 Bailey Ave
Buffalo. N.Y. 14211

For administrative and operative expenses for the month of Aug 1974

$9 00

S.J. 12

EXHIBIT G

Supporting Affidavit of Lois Muck.

06127

Sept 10, 1974

Quadco Hauling Corp
2255 Bailey Ave.
Buffalo, N.Y. 14211

Reimbursement of Expenses Paid by Pine Hill Concrete Mix Corp
the Month of August, 1974

115	Blue Cross + Blue Shield			$ 383.56
116	Aetna - Health + Accident			20.26
100 H	International Life Insurance (savings + pension)			64.98
227	Repairs to Trucks: Parts	3,015.65		
	Labor	530.00		3,545.65
203 B	Rent			83 33
231	2,367 gallons diesel	@ $.48	1,136 16	
	10,483 gallons gasoline	@ 50	5,241 50	
	245 quarts oil	@ $1.32	323.40	
	grease		198.00	6,899 06
404	Telephone			10.00
	Total Amount Due			$ 11,006 84

J Q 6

EXHIBIT H

522hh

Supporting Affidavit of Lois Muck.

Aug 31 1972

Dundee Hauling Corporation
2255 Baily Avenue
Buffalo New York 14211

Balance left on repairs to Tractor-Trailer #T-5, which was involved in accident of 6/23/72, Driver John W. Frey
$792.95

(See attached copies)

EXHIBIT I

522ii

Supporting Affidavit of Lois Muck.

September 7. 1971

Quadic Housing Corporation
2255 Bailey Ave
Buffalo New York 14211

Reimbursement of expenses paid by Pine Hill Country Mix Corporation in the month of June, 1971. (This invoice is in addition to invoice dated August 2. 1971)

227	Repairs to Equipment - Parts	$320.80	
	Labor	162.50	$483.30
231	Grease		47.00
95		Total	$530.30

SJ 6
8/31/71

EXHIBIT J

Defendants' Affidavit of Victor T. Fuzak.

RECEIVED
MAY 6 1975
RAICHLE, BANNING, WEISS & HALPERN
POST MARKED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased

Plaintiffs

-vs-

PINE HILL CONCRETE MIX CORP. REGENT SAND & GRAVEL CORP. LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants

AFFIDAVIT

CIVIL 1970-277

STATE OF NEW YORK)
: SS.
COUNTY OF ERIE)

VICTOR T. FUZAK, being duly sworn, deposes and states:

1. This affidavit is filed in response to the March 7, 1975 affidavits of Herbert G. Frey and Lois Muck on behalf of plaintiffs, and in further support of defendants' motion of January 10, 1975 for dismissal of the complaint.

2. At the outset, I respectfully submit to the Court that the Court's consideration and decision of this matter are in no way assisted by the constant repetition of intemperate, inflammatory and unsupported conclusory accusations of the most extreme and unseemly nature. The wanton invective characterizing and infecting plaintiffs' papers cannot, I submit, be accepted as a substitute for facts and reasoned consideration. On the contrary, defendants submit that the redundant and sterile accusations of wrongdoing and the use of language such as the following by the plaintiffs serves to illustrate and confirm the total lack of <u>factual</u> support for plaintiffs' claims: "double whammy weapon against plaintiffs", "a deceptive decoy to further bilk plaintiffs", "how vicious and how predatory has been defendants' assault on plaintiffs' business", "their buccaneering attempt to drive us out", "such amazing revelations of their financial strategy and assault, demonstrates both defendants' fear and their bad faith in dealing with us", "not only were intended to deceive the Court but were intended to further prejudice plaintiffs" and so and on.

3. I submit to this Court that if all the inflammatory adjectives and language, and the conclusions, and the wild accusations, and the redundant claims, and the misstatements, were

deleted from plaintiffs' affidavits, and a search were made for relevant facts, little would be left of the papers filed on plaintiffs' behalf.

I further point out that although plaintiffs move for permission to file an amended complaint, and make repeated reference to such an amended complaint, no proposed amended complaint has been provided to the Court or counsel.

4. The affidavits filed by plaintiffs are principally significant for what they do not contain:

(a) There is no answer to defendants' analysis demonstrating that the complaint does not allege facts sufficient to state a claim upon which this Court could grant any relief. Plaintiffs make no effort and provide no information to the Court in affirmative support of the complaint. Indeed, plaintiffs tacitly concede that the complaint is deficient and insufficient by talking of the filing of an amended complaint. This action was instituted in 1970. No amended complaint may be filed without the express permission of the Court. No application for the filing of an amended complaint is properly made unless the proposed amended pleading is annexed to the moving papers. No proposed amended complaint has been filed. In addition, irrespective of plaintiffs' failure and inability after five years of litigation to file a legally sufficient

complaint, defendants are entitled to have the present complaint, upon which the action has been and is premised, dismissed for legal insufficiency.

(b) Apparently, the essential and foundation claim of plaintiffs in their complaint and in all other papers filed over the years with the Court is the claim that unless plaintiffs can require defendants to supply plaintiffs' Peppermint Road concrete batcher plant with No. 1 gravel at prices 20% lower than the prices charged by defendants to all other customers, plaintiffs are and will be--for that reason--unable to compete with defendants or others in the ready-mixed concrete business. There is, of course, no authority in the Court to judicially impose and force the continuance of such a price discrimination in favor of plaintiffs. In addition, despite all of the opportunities over the years in various proceedings before this Court, and the specific challenge to plaintiffs on this motion, plaintiffs have never presented any <u>facts</u> in support of this patently insubstantial claim. In that respect, we point out the following uncontroverted facts:

(1) Plaintiffs have their own vast resources of No. 1 gravel and other aggregates at their 500-acre gravel pits and washing plant in Alexander, New York. Plaintiffs refuse to use those supplies for operation of their Peppermint Road plant <u>not</u> because it would be economically infeasible to do

so, but because plaintiffs would prefer to sell the aggregates there produced to others and to attempt to achieve an exhaustion of defendants' resources by requiring defendants to supply their gravel needs.

(ii) Plaintiffs' motivation in this respect is evidenced by the fact that they provide gravel from their Alexander pit and washing plant for operation of their Union Road concrete batcher plant. That plant is 30.8 miles distant from the Alexander pits, while plaintiffs' Peppermint Road plant is 24.1 miles from that source, or 25% closer.

(iii) There has been no showing--and indeed not even the claim--that it would be economically infeasible for plaintiffs to use their own resources of aggregate for operation of the Peppermint Road plant. Indeed, plaintiffs' president refuses to consider such use because of a determination to sell to others, and plaintiffs' president has testified that plaintiffs have made no investigation to determine costs relative to supplying the Peppermint Road plant from their Alexander pits.

(iv) There has been no showing of any need to continue operation of the Peppermint Road plant. As far as appears from all papers filed with the Court

and all testimony, plaintiffs apparently can operate their Union Road plant--which is centrally located for servicing Erie County--on an economical basis. That plant has never been supplied by defendants. It appears that if plaintiffs were intent upon effecting the most profitable operations, they would make full use of their Union Road plant instead of attempting to exhaust defendants' gravel resources by attempting to force the supplying of the Peppermint Road plant.

(v) It is also established, and unrefuted by any factual information, that gravel is not an essential and irreplaceable ingredient of ready-mixed concrete; that crushed stone is useable, used, and compliant with general specifications and definitions; and that there are readily available supplies of crushed stone at prices generally comparable to gravel in close proximity to plaintiffs' plants at Peppermint Road and Union Road. Crushed stone and gravel are in fact the same basic commodity--both commodities come from bedrock sources; the only major difference between gravel and crushed stone is that the former is the result of bedrock being broken down by natural forces while the latter is bedrock broken down by mechanical means. Sources of crushed

stone in immediate proximity to plaintiffs' Peppermint Road plant are: Lancaster Stone Products on Barton Road, Lancaster, New York (four miles) and Houdaille Construction Materials on Wehrle Drive, Clarence, New York (four and one-half miles). That crushed stone is, and can be, broadly used in ready-mixed concrete is further evidenced by the facts that all pavements on the New York State Thurway are of portland cement concrete with crushed stone, as well, for example, as Highway I-90 and the Robert Moses Parkway. Plaintiffs' own admitted use of crushed stone rather than gravel further establishes the basic interchangeability or substitutability of the two aggregates.

(c) Plaintiffs provide no <u>factual</u> information to support the generalized conclusory claims of jurisdiction. No <u>facts</u> are shown to the Court to establish the relevant market, to establish that there are <u>any</u> sales of ready-mixed concrete <u>in</u> interstate commerce, or to establish that the business itself has any material and substantial affect on interstate commerce. Unsupported speculations or opinions from unqualified sources cannot, of course, be accepted or relied upon. On this important threshold issue, the Court is entitled to <u>facts</u> not unsupported conclusions. Plaintiffs have <u>not</u> pleaded or proffered any facts to support a finding of jurisdiction.

5. Plaintiffs' current papers appear to be devoted to insubstantial and unsubstantiated claims of improper price activities by defendants in the sale of ready-mixed concrete. There is no such claim in plaintiffs' complaint. The afterthought claims now made are refuted by plaintiffs' own competitive pricing practices. Although in their affidavits plaintiffs' officers attempt to advise the Court that plaintiffs sell commercial concrete pursuant to an established, universally applicable price list, their testimony on deposition completely refutes that claim and establishes, on the contrary, that plaintiffs have been engaged in a price cutting campaign to obtain business in competition with Pine Hill and other firms engaged locally in the concrete business.

6. For this Court to have jurisdiction with respect to alleged violation of the Clayton Act, plaintiff must plead and prove facts establishing that the business in question involves sales of the product in interstate commerce. Plaintiffs have failed to show any sales of gravel, concrete, sand or ready-mix concrete in interstate commerce. These products are mined, manufactured and sold entirely within the State of New York -- there are no sales of any of these products across state lines or to foreign countries. Plaintiffs present no facts to the contrary for none exist. Accordingly, there can be no violations of the Clayton Act.

7. For this Court to have jurisdiction with respect to alleged violations of the Sherman Act, plaintiffs must plead and prove that interstate commerce is substantially and directly affected by the claims

of unlawful conduct, and that the conduct results in an undue restraint of interstate trade which is so unreasonable as to prejudice the public interest. It is not sufficient merely to plead conclusions in these respects -- facts must be pleaded from which the conclusions can reasonably be drawn. No such facts are pleaded by plaintiffs. Indeed, the Court is not advised what interstate commerce is alleged to be affected. There is no interstate commerce of gravel, sand or ready-mix concrete.

Nor has plaintiff pleaded or offered facts to establish that defendants' alleged illegal conduct had or has any substantial or direct affect on interstate commerce. If plaintiffs are to avoid dismissal of their complaint and claims on this application they must satisfy the burden of placing facts before the Court in support of their conclusory claims. This plaintiffs have not done.

Plaintiffs must also demonstrate the existence of facts to support the conclusory allegations of undue restraint of interstate commerce. Once again, although plaintiffs have had every opportunity to do so, they have provided the court with no facts which would support a finding that defendants have been guilty of an undue restraint of interstate commerce. The Federal Antitrust statutes are not intended to protect the business from loss in a competitive market. And yet, when all of the words of plaintiffs are sifted and winnowed, what is left is simply the claim that plaintiffs have been "losing money" in the ready-mix business -- a situation which, if true, can be the result of plaintiffs' own apparent inefficiency and ill-advised management, the depressed condition of the total market, or other causes wholly

unrelated to undue restraint of interstate commerce by defendants.

Deponent respectfully submits that the Supreme Court's recent decision in Gulf Oil Corp., et al. vs. Copp Paving Co., Inc. et al. No. 73-1012, decided December 17, 1974, reflects clearly and with emphasis that court's intention to protect Federal courts from spurious alleged antitrust actions overreaching jurisdiction. The case at bar is a case in point. Although this matter has been pending for five years, plaintiffs are wholly unable, even at this date, to provide the Court with facts which, if proved, would warrant relief under any Federal Antitrust statute. Accordingly, deponent respectfully requests that the defendants' motion for dismissal of the complaint be granted for the reasons stated in the Notice of Motion.

s/ Victor T. Fuzak

Sworn to before me this 7th
day of April, 1975.

s/ CAROLE L. ZEIHER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19....

Affidavit of Norman M. Moran.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RECEIVED
MAY 6 1975
RAICHLE, BANNING, WEISS & HALPERN
POST MARKED Personal delivery

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased

Plaintiffs

-vs-

PINE HILL CONCRETE MIX CORP.
REGENT SAND & GRAVEL CORP.
LUDWIG F. KAHLE, JOSEPH PFOHL,
PAUL M. PFOHL and FIDELIS H.
PFOHL, individually and as the
controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the
assets of PFOHL BROTHERS, INC.,
a dissolved corporation, and
PFOHL BROTHERS, INC.

Defendants

AFFIDAVIT

CIVIL 1970-277

STATE OF NEW YORK)
: SS.
COUNTY OF ERIE)

NORMAN M. MORAN, being duly sworn, deposes and states:

1. This affidavit is filed in response to the affidavits of Herbert G. Frey and Lois Muck sworn to March 7, 1975.

Answer to March 7, 1975 Affidavit of Herbert G. Frey:

2. Defendants deny the wholly conclusory, non-factual statements in paragraph 4.

3. Defendants deny the conclusory allegation that both plaintiffs and defendants are engaged in the ready-mixed concrete business "directly in interstate commerce" as alleged in paragraph 5.

4. Defendants deny the allegations as set forth in paragraph 6 and that the use of ready-mixed concrete in the projects or for the purposes described or conclusorily stated in paragraphs 5 and 6 constitute activities "in interstate commerce" or materially affecting interstate commerce so as to bring the business of the parties within the jurisdiction of the federal laws.

Plaintiffs afford the Court with no factual basis for the unsupported speculation that 75% of the concrete business in Western New York "consists of manufacturing, selling, delivering and pouring concrete in, for and to interstate or international projects . . . " No source is disclosed for the stated conclusion. Mr. Frey has in no sense been qualified as an expert with knowledge of the facts required to make such an assertion. His testimony on deposition indicates that he is not an expert and does not have the basic factual information required to state such a conclusion. To deponent's knowledge there are no published or otherwise available statistics or information to support a statement of conclusion of the type made. Plaintiffs provide the Court with no source or basis for the opinion given.

Apparently the view is espoused that if concrete is used in any building or construction project in any way relating to interstate commerce--even in name only, such as the "International Railway Bridge" which goes from one place in New York State to another place in the State--the business is subject to federal antitrust jurisdiction. Defendants are advised by counsel that this is not the case.

5. Again, in paragraph 7, plaintiffs' president expresses an opinion without providing any factual basis. Moreover, defendants do not import cement as erroneously stated. Defendant Pine Hill orders cement locally, from local distributors which fill the orders from material maintained in stock locally. Upon information and belief, the same is true of plaintiffs. The same is true of the articles described in B, C and D of paragraph 7. On occasion, defendant Pine Hill purchases haydite from Canada, the amount being inconsequential in contrast with total dollar and quantity volumes of other materials. Defendants "import" no perlite from out of New York State.

6. The statement in paragraph 6L that plaintiffs' pretrial discovery "is presently being held in abeyance herein at the request of defendants" is false. Plaintiffs at their own election determined to discontinue the discovery which they had commenced.

7. Mr. Frey has presented no facts upon which a finding could be made that this Court has jurisdiction over the matters raised in the complaint.

Answer to March 7, 1975 Affidavit of Lois Muck:

8. Defendants deny the allegations of paragraphs 2, 3, 4 and 5 and assert again that such allegations do not support a finding of jurisdiction or of any claim cognizable by this Court.

9. No facts are stated to substantiate the bare conclusions in paragraph 6. To deponent's knowledge there is no way that Mrs. Muck could determine what plaintiffs' "share of the market" was either on an absolute basis or relative to Pine Hill. The Court is left completely in the dark concerning the source or the basis--if any--for th allegation.

10. Mrs. Muck has admitted in her testimony on deposition that she is possessed of no personal knowledge to support the claims made in paragraphs 7, 8, 10 and 11. Claims of "surreptitous" breach of agreement are irrelevant and incorrect.

11. Defendants have responded to the false claims set forth in paragraph 12 on previous occasions. The Court will recall that plaintiffs were in no way obligated by this Court's order of June 7, 1971 to hire and pay defendants for trucking.

If plaintiffs actually felt the trucking charge provided in the order was excessive, they surely would have done their own trucking, as they were free to do. What defendants advised the Court in previous proceedings was that the independent zone trucking rate was $.70 per ton, more recently increased to $.90. The statement that defendants "wrongfully and improperly withheld from the Court and from the plaintiffs" the matters recited is a base canard. As previously stated in testimony and papers filed by defendants, Quadco is not an "affiliated" or "related" corporation. Quadco is not operating "integrally with Pine Hill". The facts concerning telephone numbers and mailing addresses are, of course, a matter of public record and knowledge, and of no relevance or significance. Contrary to the statement made, Pine Hill owns no hauling trucks.

The absurd reference to a "double whammy weapon" is also false. Whatever use Pine Hill makes of Quadco trucks is paid for in full to Quadco. Plaintiffs are completely free to provide and arrange for their own trucking--and in fact have been doing so. All of these repeated allegations and accusations are wholly irrelevant in any event.

12. Defendants deny the allegations in paragraphs 13 and 14, which are in any event conclusorily stated surplusage. To deponent's knowledge there are and were no such companies as described in paragraphs 15B and C. The Verel plant mentioned

in paragraph 16 was a small, insignificant installation. As to Queen City, Pine Hill purchased its fixed assets when it elected to discontinue business.

13. Defendants deny the once again repeated conclusory allegations of paragraphs 17 through 48 inclusive and in further specific response state:

(a) Plaintiffs' alleged "prices" are, as demonstrated by the testimony of their own representatives, a fiction. Plaintiffs have consistently engaged in a practice of tailoring prices to obtain jobs in competition with the rest of the market. The plaintiffs have no meaningful list prices.

(b) Pine Hill's concrete business is not "subsidized" by any other business, as so blithely and falsely claimed. Plaintiffs, inadvertently or otherwise, mislead the Court with the various claims of "subsidy". All payments received by Pine Hill from Quadco, from Lancaster Sanitary Landfill, Inc. or from any other firm or person doing business with it are received as reimbursement of expenses paid out by Pine Hill, or as payment for services, goods or equipment provided by Pine Hill. Plaintiffs make the astonishing representation to the Court that the total of such payments to Pine Hill constitute net receipts to Pine Hill, that Pine Hill has no expense in providing the goods, services or equipment for which the charges are made. The

falsity of such representations to the Court (e.g. that Pine Hill is being "subsidized" to the extent of $500,000.00 a year or for that matter, to any extent) is demonstrated by Exhibit C to the Muck affidavit. That Exhibit is a statement of charges to Lancaster Sanitary Landfill for equipment rented by Pine Hill to that company at industry accepted rates. Obviously, Pine Hill incurs direct and indirect costs and expenses to own and provide the equipment, and the payment it receives in rental goes toward covering thses costs and expenses. To indicate the contrary to the Court is false and misleading. Deponent can and does state categorically that Pine Hill receives no "subsidies" from any company.

(c) Pine Hill granted no free fill as a "rebate" or "additional tying consideration" on the Eastern Hills Shopping Mall. The assertion to the contrary in paragraph 27A is another false statement.

(d) Pine Hill grants no "rebates" or "free fill tie-ins" as repeatedly claimed to the Court.

(e) Allegations of "captive alter egos" and the like are false.

(f) Pine Hill does not operate and manage Quadco.

(g) Regent Sand & Gravel Corp. does not grant "rebates and discriminatory discounts" as falsely stated in paragraph 27F.

(h) The claim in paragraph 28 that defendants have control of all commercially practicable gravel lands in the Buffalo-Western New York area excepting only Clarence Sand & Gravel and Dan Gernatt is such an irresponsible and patently incorrect claim that it should demonstrate to the Court the lengths to which plaintiffs are prepared to go in providing the Court with inaccurate information in order to continue to harass defendants with this suit. There are almost innumerable gravel deposit sites in the Erie County area. As demonstrated in previous affidavits, plaintiffs have themselves admitted this fact and have admitted years of dealing in gravel properties. It is clear that plaintiffs have actually purchased concrete sand and gravel from other sources of supply in the area: Batavia Sand & Gravel; Buffalo Slag Co.; General Crushed Stone; and Frey Sand & Gravel Co.

There are geologically identified gravel deposits containing quality sands and gravels in the Clarence, New York area with deposits averaging 10 to 30 feet thick; deposits north of South Newstead averaging 20 feet thick; deposits in the Alden, New York area varying from 20 feet to some 50 feet thick, to name but a few of the areas of deposits. Any claim

that there are no remaining available sand and gravel lands in the Erie County area is, simply stated, patently false.

Moreover, plaintiffs themselves own vast supplies of sand and gravel in Alexander, New York, where plaintiffs operate their own major washing plant. From this plant and these hundreds of acres of gravel properties plaintiffs make general sales of sand and gravel to others and supply their own Union Road concrete batching plant. Plaintiffs' Alexander gravel plant is 30.8 miles from their Union Road batching plant. Plaintiffs could if they wished fully supply their sand and gravel requirements for their Peppermint Road batching plant from their Alexander deposits. The distance between the latter two points is 24.1 miles. However, instead of doing so, plaintiffs are attempting to force defendants to supply their Peppermint Road requirements from defendants' limited supplies of gravel. I refer the Court to pages 13-16 of my affidavit of January 10, 1975 setting forth the testimony of plaintiffs' president that, in substance, if plaintiffs have any problem concerning supply of gravel--which defendants deny--it is of plaintiffs' own making and control.

(i) In addition, there are readily available supplies of crushed stone in proximity to plaintiffs' Peppermint Road plant from which plaintiffs could--if they wished--obtain complete supplies of aggregates for that plant. Crushed stone can, in most instances, be used in ready-mixed concrete as the

aggregate. Both gravel and crushed stone are generally accepted aggregates in ready-mixed concrete. The cost of each is generally comparable. Plaintiffs' claims of absolute need to obtain gravel from defendants for their Peppermint Road plant are completely insubstantial. If plaintiffs can economically supply their Union Road batcher plant from their Alexander gravel plant (30.8 miles), they can supply their Peppermint Road batcher plant from their Alexander gravel plant (24.1 miles). Moreover, there are sources of crushed stone in immediate proximity to plaintiffs' Peppermint Road plant from which plaintiffs could obtain their requirements of aggregates. That crushed stone or gravel can be used in ready-mixed concrete is uncontrovertibly established by the following excerpts from controlling Specifications and Definitions:

1. New York State Department of Transportation (NYSDOT): "Standard Specifications for Construction and Materials", January 2, 1973 (most recent specs and those now in use.)

   703-01 FINE AGGREGATE (pages 598-601)

   "SCOPE. This specification covers the material details, quality requirements and methods for sampling and testing fine aggregate generally used in portland cement concrete ----------."

   "MATERIAL REQUIREMENTS. Fine Aggregate shall consist of natural sand or manufactured sand ----------."

   703-02 COARSE AGGREGATE (pages 601-608)

   "SCOPE. This specification covers the material details, requirements and methods of testing for sampling and testing coarse aggregate generally used in portland cement concrete, --."

"MATERIAL REQUIREMENTS. Coarse Aggregates shall consist of crushed stone, crushed gravel, screened gravel, or crushed air-cooled blast furnace slag, ----------".

2. American Society for Testing Materials (ASTM): "Standard Definitions of Terms Relating to Materials for Roads and Pavements" (ASTM Designation: D8-72).

Aggregate - "The inert material, such as sand, gravel, shell, slag, or broken stone or combinations thereof, with which the cementing material is mixed to form a mortar or concrete."

3. American Society for Testing Materials (ASTM): "Standard Specification for Concrete Aggregates" (ASTM Designation C33-71a).

"SCOPE. This specification covers fine and coarse aggregate, other than lightweight aggregate, for use in concrete."

FINE AGGREGATE

"General Characteristics. Fine aggregate shall consist of natural sand, manufactured sand, or a combination thereof."

COARSE AGGREGATE

"General Characteristics. Coarse aggregate shall consist of gravel, crushed gravel, crushed stone, or crushed air-cooled blast furnace slag, or a combination thereof, ----------."

4. Portland Cement Association (PCA): "Design and Control of Concrete Mixtures", 10th ed. 1952.

Chapter 2, Materials for Concrete (page 11)

Aggregates. "In the following discussion of aggregates it is assumed that the materials used will be from a commercial plant; ----------."

"The commonly used aggregates are sand, gravel, crushed stone and blast furnace slag."

5. Portland Cement Association (PCA): "Cement Mason's Manual for Residential Construction", 1960.

Fundamentals of Quality Concrete (page 7)

Aggregates

"Fine aggregate consists of sand or other suitable fine material."

"Coarse aggregate consists of gravel, crushed stone or other suitable materials larger than 1/4 inch."

Lancaster Stone Products in Lancaster is four miles from plaintiffs' Peppermint Road plant. Houdaille Construction Materials in Clarence is four and one-half miles.

Plaintiffs' claims of the unavailability of required aggregate--except from defendants--is clearly without substance.

(j) Pine Hill sells at prices required by the competition of plaintiffs and others, and by the general condition of the ready-mixed market, which, for the past six or more years has been extremely bad from the standpoint of suppliers. In addition to plaintiffs, Pine Hill must compete with the following companies which are actively engaged in the ready-mixed concrete business in Erie County:

Niagara Concrete

William Bender

Clarence Ready Mix

Schabell Ready Mix

Riley Ready Mix

Riefler

Quality Concrete

Town Line Ready Mix

Stone Concrete Mix

14. Defendants respectfully submit that plaintiffs have

(a) failed to state any claim in its complaint on which relief can be granted;

(b) completely failed to allege facts in its complaint to establish that this Court has jurisdiction over the claims made;

(c) totally failed to present any facts to the Court on this motion to support the conclusory claims of jurisdiction based on alleged interstate commerce;

(d) and have failed to present any facts to avoid

defendants' request for summary judgment.

Norman M. Moran

Subscribed and sworn to before
me this 7th day of April, 1975.

Victor T. Fuzak

VICTOR T. FUZAK
Notary Public State of New York
Qualified in Erie County
My Commission Expires Mar. 30, 19 76

Plaintiffs' Motion to Compel Production.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

CIVIL NO. 1970-277

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

MOTION

Plaintiffs move the Court for an Order compelling defendants to allow plaintiffs and their attorneys, accountants and representatives, discover, inspect and copy defendants' books, papers and records relating to the matters involved in this action.

This motion is based upon the annexed affidavit of James J. Neill, Jr., sworn to May 5, 1975, and upon all of the other pleadings and proceedings heretofore had and taken herein.

Dated: Buffalo, New York
May 6, 1975.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss, a Member of the Firm
Attorneys for Plaintiffs

Supporting Affidavit of James J. Neill, Jr.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased,

Plaintiffs,

CIVIL NO. 1970-277

vs.

AFFIDAVIT OF JAMES J. NEILL, JR.

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

STATE OF NEW YORK:
ss
COUNTY OF E R I E:

JAMES J. NEILL, JR., being duly sworn, deposes and says:

1. I am Vice President of Frey Concrete, Inc., plaintiff in the within-entitled action. I am in charge of the accounting and finance recording on behalf of said corporation. I make this affidavit in support of plaintiff's motion to compel discovery or, alternatively, strike defendants' answer and defenses and impose other appropriate sanctions.

2. I have been designated by plaintiffs to inspect defendants' records pursuant to the pretrial discovery and inspection procedures which plaintiffs are presently attempting to conduct of defendants' books and records.

3. My visits to defendants' place of business has been on occasions which were pre-arranged with defendants or their counsel. I herewith set forth a list of the dates and times of my visits (the date and starting time was set by defendants, and deponent was informed that the "office closes at 5:00 P.M.":

	Date	Time	Comment
1.	12/18/74	1:00 P.M. to 4:30 P.M.	Initial visit by deponent, Elwin G. Day, Lois Muck and Arnold Weiss devoted mostly to exploration scope of records and which records would be furnished.
2.	12/19/74	00 P.M. to 4.30 P.M.	First date of actual inspection by deponent and Lois Muck. Hand-written copies of certain inter-company invoices were made at this time which demonstrated that annual inter-company transactions approximate $500,000.00.
3.	3/27/75	2:10 P.M. to 4:30 P.M.	Deponent resumes inspection following oral argument of motion before Magistrate Maxwell on March 14, 1975.
4	3/28/75	2:15 P.M. to 4:30 P.M.	Deponent continued inspection. On this occasion, deponent handed defendants' representative invoice binders for August, 1974 with paper clips placed on selected invoices of which deponent requested copies. Defendants agreed to furnish copies of those items.

5.	4/1/75	2:00 P.M. to 4:30 P.M.	Deponent continued inspection. Defendants' representative returned August, 1974 invoice binder to deponent together with folders supposed to contain the copies requested. The paper clips were still attached to the items in the invoice binders. Deponent inspected the folder of copies and noticed that defendants did not furnish him with Pine Hill's copies of any of the inter-company invoices between Pine Hill and any of the other defendants or proposed defendants such as Lancaster Sanitary Landfill, Quadco Hauling, Regent Sand and Gravel, Stage Farms Incorporated, Jamison Bank Run Gravel Corporation, Buffalo Perlite, etc.). On this occasion, the Pine Hill representative stated to deponent "do not remove the paper clips which are attached to the invoices in the invoice folders for August, 1974". I did not remove these clips but checked and noticed that the clips were still affixed to the inter-companies' billings of which I requested copies but which Pine Hill refused to supply.
6.	4/2/75	2:00 P.M. to 4:00 P.M.	Deponent continued his inspection. However, when deponent inspected the August, 1974 invoice folders, previously mentioned, I noticed that <u>all inter-company</u> billings were physically removed from the folders. Deponent understands that they either have been removed from all of the other folders or that deponent will be denied access to them and they will be removed from any files of which he requests an inspection.

7.	4/7/75	2:45 P.M. to 4:30 P.M.	Deponent continued inspection.
8.	4/8/75	2:30 P.M. to 4:00 P.M.	Deponent continued inspection.
9.	4/11/75	2:30 P.M. to 4:00 P.M.	Deponent continued inspection
10.	4/14/75	2:30 P.M. to 4:00 P.M.	Deponent's continued inspection of records furnished. Deponent unable to continue inspection because of defendants' refusal or failure or refusal to furnish all of the relevant records requested for the 1974 period such as the cash disbursement records, the general ledger, the payroll records, the journal entries, the standard journal entries, the sales journal and defendants' copies of the inter-company billings (removed from the files by defendants) and other inter-company invoices and records, and year-end adjustments, etc.

4. The only records which defendants have allowed deponent to inspect are:

A. Ready-mixed cash receipts through September 30, 1974;

B. Ready-mixed sales invoices through August 31, 1974 (excluding inter-company invoices;

C. Ready-mixed account receivable cards for transactions through August 31, 1974.

5. Defendants have refused to furnish deponent with the following books and records which deponent specifically

requested:

A. Defendants' cash disbursement books and records;

B. Defendants' general ledgers;

C. Defendants' general journal entries;

D. Defendants' standard journal entries;

E. Defendants' sales journals;

F. Defendants' payroll records;

G. Defendants' copies of all inter-company billings, invoices and records including but not limited to inter-company billings between the present and proposed defendants in this action;

H. Any records after August 31, 1974.

6. Deponent is operating under the general supervision of the auditor of the corporation, Mr. Elwin G. Day, C.P.A. of the firm of Lathan Lumsden McCormick & Company. Deponent was specifically instructed by Mr. Day to request and inspect each of the aforesaid books and records.

7. Deponent is unable to proceed any further with his inspection of defendants' 1974 records unless he is able to inspect the other records requested for 1974. It is impossible for deponent, or any auditor or accountant, to obtain an accurate and overall picture of any business operation without having all of the records in which relevant entries concerning a transaction in question can be made. It

is not possible to draw any conclusions from the records furnished concerning the year 1974, or any month thereof of 1974, without the additional records since these records could substantially affect the conclusions which could be drawn from the limited records furnished.

8. For example, although deponent has not been allowed to have copies of, or an inspection of the Pine Hill's billings to Lancaster Sanitary Landfill, Inc., deponent was able to ascertain that Pine Hill Account 96, which reflects Pine Hill's cash receipts from Lancaster Sanitary Landfill, Inc. show total receipts for the nine months ending September 30, 1974 of $307,143.63. During this same period, Pine Hill sold a total of 116,389.5 yards of concrete. It thus appears that Pine Hill was receiving a payment, subsidy, or income from its affiliated company of $2.63 per yard in the first nine months of 1974.

9. Obviously, Pine Hill was aided in perpetuating its $22.00 per yard concrete price, in the face of admitted cost and material increases by the $2.63 per yard payment or subsidy, since this in effect gave Pine Hill the benefit of having a price of $24.63 and thereby prevented plaintiffs from effectively competing with Pine Hill.

10. However, this Pine Hill Account 96 with Lancaster Sanitary Landfill is only one of many accounts of inter-company subsidies or income and it appears to deponent that the total of these payments for all of the other companies for the year 1974 would greatly increase the total income or subsidies which Pine Hill received from its related companies.

11. It is only by examining all of the records requested, and for the full 1974 period, this deponent can determine the full nature and extent of these cash receipt subsidies or income, and whether or not there have been any adjusting additional offsetting or increased receipt payments or income.

12. Normal accounting procedure requires that all of the relevant records be available for study and for testing in order to verify the accuracy thereof.

13. Deponent cannot proceed any further with his inspection of the records for the year 1974 until these records are furnished. Deponent does not believe it would be useful to inspect the limited records which defendants are willing to make available, for the years prior to 1974 so that he can understand and verify the nature of defendants' accounting system and accounting treatment of the various items involved.

James J. Neill, Jr.

Sworn to before me this
5th day of May, 1975.

F. TERRY SZYMCZYK
Notary Public, State of New York
Qualified in Erie County

Affidavit of Victor T. Fuzak Dated July 14, 1975.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased

Plaintiffs

-vs-

AFFIDAVIT

CIVIL 1970-277

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.

Defendants

STATE OF NEW YORK)
: SS.
COUNTY OF ERIE)

VICTOR T. FUZAK, being duly sworn, deposes and says:

1. This affidavit is filed in response to the plaintiff's motion dated May 6, 1975 and the affidavit of James J. Neill, Jr., sworn to May 5, 1975.

2. This action, by the terms of the complaint, relates specifically and solely to the period of time preceding the institution of the action in June 1970. Despite this fact, and despite the fact that there are no existing claims in this litigation with reference to the conduct of the defendants subsequent to the commencement of the action, the plaintiffs improperly demand production of documents and papers of defendants, and others, created subsequent to June 1970 which have no relevance to the issues as delineated by the complaint. Moreover, the plaintiffs, who are in direct competition on a daily basis with the defendants, seek by discovery proceedings in this action to obtain highly confidential, current operating information from the defendants, the disclosure of which would be detrimental to defendants' position in the competitive market. Plaintiffs are not entitled to the production of any materials coming into existence subsequent to the commencement of this action.

3. To deponent's personal knowledge, and on the basis of advice received from Mr. Norman M. Moran, the various times for inspection of documents set forth in paragraph 3 of Mr. Neill's affidavit were the result of mutual agreement between the parties. The fact that the plaintiffs elected to sharply curtail the hours of discovery was solely by reason of plaintiffs' own election and not through any restraints imposed by defendants, other than those necessarily existing in connection

with operation of defendants' offices during regular business hours. Such materials as defendants refused to produce were delineated by deponent as counsel on the basis that the specific materials were not properly subject to inspection by plaintiffs in this proceeding. Any materials not made available were specifically noted and disclosed to plaintiffs' representatives, contrary to the unfortunate and misleading inferences contained in Mr. Neill's affidavit. The plaintiffs are in no sense unable to continue inspection of documents available to them. There is a very substantial amount of records which defendants have agreed to produce for inspection but which plaintiffs have elected not to examine.

4. The recitation of the "only records which defendants have allowed" plaintiffs to inspect as set forth in paragraph 4 of Mr. Neill's affidavit is inaccurate. Other records have been made available but plaintiffs have elected not to examine them.

5. Mr. Neill states in paragraph 7 of his affidavit that: "It is not possible to draw any conclusions from the records furnished concerning the year 1974, or any month thereof of 1974, . . . " Mr. Neill then proceeds nonetheless to draw a number of wholly false and inaccurate conclusions in the remaining paragraphs of his affidavit, making allegations of subsidy and the like which are not only untrue but which are not supported by the records of defendants which have been made

available to plaintiffs, and not supported by the facts. For example, in paragraph 9 of his affidavit Mr. Neill makes reference to a $22.00 per yard concrete price without advising the Magistrate that this price applies to wall concrete only, which is a minor portion of the business of the industry and of plaintiffs. That paragraph is also misleading and false in making the wholly unsupported and unsupportable claim of "subsidy" and of alleged prevention of the plaintiffs from effectively competing with Pine Hill. On the contrary, plaintiffs continue to this date to effectively compete with Pine Hill and with others in the industry locally.

6. Deponent respectfully submits that the obvious purpose of the motion and of the efforts of plaintiffs to obtain discovery is not to obtain information in support of the claims contained in the complaint, but rather, improperly, to attempt to determine whether there may be some basis, any basis at all, to attempt to generate legally cognizable claims against one or more of the defendants.

7. During the past six months, there has been no impediment to the plaintiffs' pursuing discovery of those books and records which defendants have indicated would be made available for inspection.

8. Defendants have made a motion to Judge Curtin for dismissal of the complaint. That motion has been finally submitted and all papers with respect to it have been filed. The motion is currently under

consideration by Judge Curtin and it is reasonable to expect that a decision will be forthcoming very shortly. Under those circumstances, the defendants request and hereby cross-move for a stay of any further discovery and inspection by plaintiffs pending receipt of Judge Curtin's decision. Obviously, if, as defendants have submitted, the complaint fails to state a cause of action and the Court does not have jurisdiction over such claims as have been made, it would be entirely inappropriate to permit this competitive organization to have any access to defendants' books, records and competitively confidential information.

Victor T. Fuzak

Subscribed and sworn to before
me this 14th day of July, 1975.

Carole R. Zeiher

CAROLE L. ZEIHER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1976

Opposing Affidavit of Lois Muck.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased,

Plaintiffs,

CIVIL NO. 1970-277

vs.

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

AFFIDAVIT OF LOIS MUCK.

STATE OF NEW YORK:
COUNTY OF E R I E: ss
CITY OF BUFFALO:

LOIS MUCK, being duly sworn, deposes and says:

1. I am Secretary and Treasurer of the plaintiff Frey Concrete, Inc. and make this affidavit in further opposition to the defendants' motion to dismiss the complaint for lack of jurisdiction, and in further support of plaintiffs' motion to serve an amended complaint more adequately setting forth the jurisdiction of this Court.

2. Deponent by this affidavit desires to demonstrate that defendants are incorrect in claiming that plaintiffs are not engaged in interstate commerce and that plaintiffs' concrete business is governed by the asphalt business which was the subject of the Supreme Court's decision in Gulf Oil Corporation v. Copp Paving Company, U.S. , 42 L.Ed. 2d, 378, decided at the last Term of the Supreme Court.

3. In the Gulf Oil case, the Supreme Court noted that the Court found that

> "*** asphaltic concrete is made wholly from components produced and purchased intrastate and that the product's market is exclusively and necessarily local. Because of these factors, the Court concluded that the alleged restraints of trade in asphaltic concrete could not be deemed within the flow of interstate commerce, despite use of the produce in interstate highways. Moreover, Copp had failed to show, either by deduction from the evidence or by the evidence itself, that the alleged restraints as to asphaltic concrete would affect any interstate market. It had neither shown a necessary or probable adverse consequence to the construction of interstate highways and hence to the flow of commerce, nor had it suggested or supported a theory by which restraints on local trade in asphaltic concrete affect the interstate liquid asphalt market.

Opposing Affidavit of Lois Muck.

****

"Copp does not contend that Industrial and Sully-Miller in fact make interstate asphaltic concrete sales or are otherwise directly involved in national markets cf. U.S. v. Philadelphia National Bank, 374 U.S. 321, 336, n 12 (1963) nor does it contend that the local market in asphaltic concrete is an integral part of the interstate market in other component commodities or products. Instead, Copp's 'in commerce' argument turns entirely on the use of asphaltic concrete in the construction of interstate highways."

****

"There may be circumstances in which activities, like those of Sully-Miller and Industrial, would have such effects on commerce. On the record in this case, however, the conclusion that no such circumstances existed here cannot be considered erroneous. This being so, the 'effects on commerce' theory even if legally correct, must fail for want of proof."

4. Our case, now before the Court, is much different than the Gulf Oil case decided by the Supreme Court because we make "Portland cement" concrete rather than "asphaltic" concrete which was involved in the Gulf Oil case. Both Portland cement concrete and asphaltic concrete use coarse and/or fine aggregates such as gravel and/or sand. In both the Gulf Oil case and in our case, these aggregates were secured from intrastate sources. However, Portland cement concrete frequently also utilizes different or additional ingredients and/or additives. For example, we frequently use Pozzolith as a mixture additive and light-weight aggregates in place of gravel or stone.

5. We secure Pozzolith additives from Master Builders Company in Cleveland, Ohio. It is shipped directly to us from Cleveland. During the past 18 months, i.e. during 1974 and one-half of 1975, we purchased Pozzolith additives totalling $53,911.30 which was shipped directly to us from Cleveland, Ohio.

6. Assuming that our Pozzolith purchases continue at the same rate, our annual 1974-75 interstate Pozzolith purchases will average $36,000.00 per year.

7. Another difference between the asphaltic concrete business involved in the Gulf Oil case and the Portland cement concrete business involved in this case is the use of light-weight aggregates by us and by the other concrete companies, including defendants. Our principal light-weight aggregate is

Haydite which we purchase from Domtar Construction Materials, Ltd. of Montreal, Quebec. We pick up this material in Cookesville, Ontario. We deliver it directly to our plants in Buffalo. During the past 18 months, i.e. during 1974 and one-half of 1975, we purchased Haydite light-weight aggregates from Domtar in the total amount of $86,093.00. Assuming our purchases continue at the same rate for the remainder of 1975, our annual Haydite imports from Canada for 1974-5 will average approximately $57,000.00 per year.

8. Another major difference between the asphaltic concrete involved in the Gulf Oil case and the Portland cement concrete involved in our case was that the Court noted that the asphaltic concrete there involved was "made wholly from components produced and purchased intrastate". The Court in the Gulf Oil case found that:

> "Petitioners Union Oil Company, Gulf Oil Corporation, and Edgington Oil Company, defendants below, produce liquid petroleum asphalt from crude oil at their California refineries."
>
> **********
>
> "Edgington Oil Company sells its liquid asphalt to *** respondents."
>
> **********
>
> "Respondents *** operate a hot plant in Artesia, California, where they produce asphaltic concrete."

Opposing Affidavit of Lois Muck.

****

"*** on the facts presented to it, the Court found that asphaltic concrete is made wholly from components produced and purchased intrastate ***." (Italics supplied).

9. However, the situation is completely different in our case since the Portland cement, which is the equivalent of the liquid asphalt bonding agent in the Gulf Oil case, is produced and purchased interstate, by both plaintiffs and defendants, as well as by the other Portland cement concrete companies in this area.

10. Our cement is manufactured in Canada by Canada Cement Lafarge, Ltd. (Northeast Cement Company) and Wyandotte Cement Company and in Michigan by the Huron Cement Company.

11. Our shipments from Canada Cement Lafarge, Ltd. (Northeast Cement Company, Inc.) are either shipped directly to us from the Canadian plant or are loaded from railroad cars which the cement companies maintain in the Buffalo area.

12. During the 12 months of 1974 and the first 6 months of 1975, we purchased and were shipped cement, directly from Canada Cement Lafarge, Ltd. plants at Woodstock, Ontario, St. Catherines, Ontario, and Clarkson, Ontario, in the total amount of $178,220.82. (This does not include the purchases

which we made from their railroad cars in the Buffalo area during said 18-month period, of $143,619.40).

13. Assuming that our purchases for the second half of this year will be at the same rate, for the year 1974-5, our annual cement purchases shipped directly to us from Canada by Northeast Cemert Company from the Canada Cement Lafarge, Ltd. plants will average $109,000.00 per year and the cement produced in Canada but shipped from the Buffalo railroad cars will average $96,000.00 per year.

14. Our purchases of cement from the Wyandotte Cement Company are shipped to us either from their plant at Mississauga, Ontario, or from a warehouse which the company maintains in Buffalo.

15. During the 18-month period ending June 30, 1975, our purchases of Wyandotte cement which were shipped to us directly from Mississauga, Ontario totalled $114,584.77, and our purchases shipped from their Buffalo warehouse during said period total $251,508.01.

16. Assuming that our purchases continue at the same rate for the remainder of 1975, for the years 1974-5 our average cement purchases from Wyandotte shipped to us

directly from their Mississauga, Ontario plant would average approximately $76,000.00 per year and our purchases of Wyandotte cement produced in Canada but shipped from their Buffalo warehouse would average $168,000.00 per year.

17. In addition, we purchase cement produced in Michigan, and sent to Buffalo by the Huron Cement Company of Alpina, Michigan, and maintained in a silo in Buffalo, New York from which it is trucked to our plant.

18. During 1974 and the first half of 1975, we purchased cement from these silos of the Huron Cement Company in the total amount of $735,565.26.

19. Assuming that our purchases continue on the same basis for the remainder of this year, our average purchases from the Huron Cement Company's silos in Buffalo will average approximately $490,000.00 per year for the years 1974 and 1975.

20. Thus, our purchases of products which are manufactured by, and shipped to us directly from, out-of-state or Canada totalled $940,000.00 computed as follows:

Opposing Affidavit of Lois Muck.

Item	Company and Shipping Point	Average Dollar Volume 1974 and 1975
Pozzolith	Master Builders Company Cleveland, Ohio	$ 36,000.00
Haydite Light-Weight Additive	Domtar Construction Materials, Ltd. Cookesville, Ontario	$ 57,000.00
Cement	Canada Cement Lafarge, Ltd. (Northeast Cement Company) St. Catherines, Ontario, Woodstock Ontario, and Clarkson, Ontario	$109,000.00
Cement	Wyandotte Cement Company Mississauga, Ontario	$ 76,000.00
	TOTAL PRODUCED IN AND SHIPPED FROM MICHIGAN OR CANADA	$278,000.00 per year
Cement	Northeast Cement Company, (Buffalo railroad cars)	$ 96,000.00
Cement	Wyandotte Cement Company (Buffalo warehouse)	$ 76,000.00
Cement	Huron Cement Company (Buffalo silo)	$490,000.00
	TOTAL CEMENT PURCHASES SHIPPED FROM BUFFALO SILOS, WAREHOUSE OR RAILROAD CARS	$662,000.00
	TOTAL OF ALL CEMENT ADDITIVE AND LIGHT-WEIGHT AGGREGATE PURCHASES MANUFACTURED OR PRODUCED OUTSIDE OF THE STATE OF NEW YORK	$940,000.00

Opposing Affidavit of Lois Muck.

21. I believe that defendants' purchases of cement shipped to them from out-of-the-state, are at least equal to the foregoing purchases; and that our other competitors purchase approximately a similar amount in total.

22. These factors can only be positively developed on depositions and discovery, but defendants have thus far refused to furnish this information and motions to compel this are pending before the Court.

23. Based on my assumptions however, the Niagara Frontier area, with its Buffalo Port of Entry, constitutes an international cement market of approximately $1,500,000.00 imported per year and an interstate cement market of approximately $1,500,000.00 per year. Again these are estimates based on my knowledge of the industry and more accurate figures will be obtained on our pretrial discovery.

24. The pricing structure of this cement is volatile and highly responsive to market pressures, due to the highly competitive situation existing between the Canadian and American cement, and between the Canadian companies themselves. For this reason, cement prices are also considered confidential.

25. Defendants' actions against us tend to cause us to receive less favorable cement prices due to the threat of defendants' causing us to have a lesser share of the market and to be more vulnerable to increases in cement prices.

Opposing Affidavit of Lois Muck.

26. We cannot learn of defendants' activities with respect to cement prices until we have our discovery, but defendants have discovered and inspected all of our cement purchase and price records and have thus a further advantage over us.

27. The Portland cement concrete market conditions involved in our case are also quite different from those in the Gulf Oil case.

28. Buffalo is the largest Port of Entry on the Canadian border, an active international trade and commerce exists in this area, which is generally called The Niagara Frontier Area. It is a unique area and sector of interstate and international commerce, and defendants are attempting to completely monopolize the international and interstate trade and commerce which flows into and through this unique area.

29. In the Gulf Oil case, the Court noted that there was no contention that:

> "***the local market in asphaltic concrete is an integral part of the interstate market in other commodities or products. Instead Copp's 'in commerce' argument turns entirely on the use of asphaltic concrete in the construction of interstate highways."

30. The Court in the Gulf Oil case also based its decision on Copp's failure to:

> "*** allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal anti-trust prohibitions."

31. After noting that Copp "was allowed full discovery as to all interstate commerce issues", (which we have not yet had), the Court noted that Copp:

> "*** presented no evidence of effect on interstate commerce. Instead it argued merely that such effects could be presumed from the use of asphaltic concrete in interstate highways *** There may be circumstances in which activities like those of Sully-Miller and Industrial, would have such effects on commerce. On the record in this case, however, *** no such circumstances existed ***."

32. However, even without our discovery, our evidence, allegations and affidavits show that we are not so limiting ourselves, and claim, and seek to prove, and believe we have already shown, that even if our out-of-state purchases are not interstate or foreign commerce, then at least defendants' activities have decided burdens and effects on interstate commerce, or do defendants' attempts to monopolize the interstate

and foreign commerce in cement, additives, aggregates; concrete, as well as monopolize the construction of projects, highways and arteries of commerce in the international frontier market known as the Port of Buffalo and The Niagara Frontier Area.

33. To make these allegations clearer, plaintiffs very shortly intend to serve, with permission of the Court, an amended and supplemental complaint, for which we have previously moved. Even if our discovery is still incomplete, and we may have to later file a further amended complaint, we request that we be allowed to now file an amended complaint which will more directly allege the effects on commerce of defendants' actions, and the interstate and foreign commerce which defendants have been attempting to monopolize, restrain and interfere with.

Lois Muck

Lois Muck

Sworn to before me this
31st day of July, 1975.

F. TERRY SZYMCZYK
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 76

Order of August 4, 1975.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

vs. Civil 1970-277

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

On May 12, 1975, the court heard oral argument on defendants' motions pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, and on plaintiffs' motion to file an amended complaint. The plaintiffs requested time to file a further brief to directly respond to defense arguments and to supply a proposed amended complaint to accompany the motion to amend.

80

At the time of oral argument, the court indicated to counsel that it appeared that the argument of defense was substantial and an answering brief was most important. The court has not received either a brief or proposed amended complaint.

The defense argues that the complaint, which charges violations of Sections 1 and 2 of the Sherman Act and Sections 1 and 4 of the Clayton Act, should be dismissed pursuant to Rule 12 because the allegations are conclusory. The defense claims that the complaint does not set forth allegations to show that the court has jurisdiction, or that the defendants have violated either Act.

Both parties have been engaged in the ready-mix concrete and gravel business in the Western New York area for some time, but there are no allegations that any of the parties have ever sold any material outside of New York State. An insinuation is made that some of the gravel or concrete is used on highways or airports which are part of interstate commerce. But, under Gulf Oil Corp. v. Copp, 42 L.Ed.2d 378 (1974), this is not enough

to withstand a jurisdictional motion.

Citing Sandidge v. Rogers, 156 F.Supp. 286 (S.D. Ind. 1957), Broadcasters, Inc. v. Norristown Broadcasting Corp., 185 F.Supp. 641 (D. N.J. 1960), and Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964), the defense argues that this complaint must be dismissed because the allegations of prohibited antitrust activity are conclusory. As I have already indicated, these arguments are substantial and strongly persuasive that the complaint should be dismissed. However, to make certain that there was no misapprehension of the court's directive, the plaintiffs are given until August 18, 1975 to file the promised brief.

The defense also moves for summary judgment relying upon "affidavits filed in support of this motion, affidavits previously filed by the parties to this action, the hearings and proceedings heretofore had, the depositions of defendants and applicable law." However defense counsel does not identify in particular the documents upon which he relies. Before passing upon the motion for summary judgment, the court directs the defense to file

a statement describing in detail the papers on which reliance is placed in urging this motion, and a brief fact statement explaining what these documents reveal pertinent to this case. This shall be done by August 18, 1975.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: August 4, 1975

Letter Dated August 8, 1975 to Judge Curtin from Defendants' Attorneys.

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August 8, 1975

Hon. John T. Curtin
U.S. Court House
Niagara Square
Buffalo, New York 14202

Re: Frey Concrete Corp. v. Pine Hill et al.

Dear Judge Curtin,

We have received a copy of Mr. Weiss's letter of July 31, 1975, with the enclosed additional affidavit, and a copy of Your Honor's Order of August 4, 1975. We will, of course, comply with that Order. In the interim, the Court should be advised of the following facts in order that this matter be kept in proper perspective:

Defendant's Motion to Dismiss the Complaint was filed on January 10, 1975, returnable on January 20, 1975. The Argument and submission of that motion was delayed - at the instance of the plaintiffs - until May 12, 1975 by which date the plaintiffs presumably were to file all affidavits and memoranda which they intended to file concerning the issues raised. Despite repeated indications to the Court and to counsel, starting as early as October of last year, that the plaintiffs intended to file an amended complaint - an apparent concession to the fact that the complaint filed in 1970 is legally insufficient - no such amended complaint has yet been presented. No grounds for the filing of any amended complaint more than five years after commencement of the action have been shown.

Letter Dated August 8, 1975 to Judge Curtin from Defendants' Attorneys.

On May 12, 1975, the Court specifically advised plaintiffs that if they desired to file a Memorandum of Law on the issue of the legal sufficiency of the complaint, that they should do so promptly. Almost three months have elapsed without any such filing.

Now plaintiffs infer in counsel's letter of July 31, 1975, that they have somehow been prohibited from pursuing discovery by the defendants and or the Magistrate. This is not the case. Pursuant to the plaintiff's Demand for Discovery, defendants have voluntarily made available for plaintiff's inspection literally tens of thousands of documents extending over a demanded period of more than twenty years relating to pricing by the defendants. Plaintiffs made a brief review of a miniscule portion of those demanded papers and, at their own decision, elected to discontinue further inspection.

Defendants sought a protective order with reference to portions of plaintiff's Demand for Discovery. At the request of plaintiffs, the dates for argument and submission of motions relating to discovery were adjourned on numerous occasions over a six month period.

The matter was argued on August 6, with the Magistrate again noting that no impediment had existed to the continuation of discovery by plaintiffs, and ordering that plaintiffs be permitted access to the records which have been available to them throughout and to invoices showing product purchases by defendants. The Magistrate expressly stated and restated that his ruling should not in any way be used by plaintiffs to attempt to delay this Court's ruling on the Motion to Dismiss the Complaint.

Any failure to proceed - either with respect to the Motion to Dismiss or with respect to discovery - lays at the feet of the plaintiffs. It is unfortunate that counsel should infer that such failure is attributable either to defendants or to the Magistrate.

In any event, the essential fact of the entire proceeding is that the complaint fails to state any cause of

Letter Dated August 8, 1975 to Judge Curtin from Defendants' Attorneys.

action, is clearly deficient as a matter of law, and should be dismissed.

Respectfully yours,

Victor T. Fuzak

VTF:lll
cc: Victor Manz
Norman Moran
Arnold Weiss

Plaintiffs' Cross-Motion to Complete Discovery, Serve an Amended Complaint, and Defer Defendants' Motion to Dismiss.

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

CIVIL NO. 1970-277

PINE HILL CONCRETE MIX CORP., et al

Defendants.

PLAINTIFFS' CROSS-MOTION.

Plaintiffs move the Court for:

A. Leave to complete their discovery and depositions of defendants and their records on the commerce issue; as well as of third-party ready-mix competitors, interstate cement and other raw material suppliers, and interstate customers for plaintiffs' and defendants' concrete, relating to the commerce issue;

B. Leave to thereafter file and serve an amended complaint setting forth the information obtained by plaintiffs as a result of said discovery; and

C. Deferring or denying without prejudice to renewal, defendants' motion to dismiss, until said discovery, depositions and amendment have been completed with all reasonable diligence on plaintiffs' part.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss
A Member of the Firm
Attorneys for Plaintiffs

Dated: Buffalo, New York
August 18, 1975.

Supplemental Opposing Affidavit of Lois Muck.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

CIVIL NO. 1970-277

SUPPLEMENTAL AFFIDAVIT OF LOIS MUCK IN OPPOSITION TO MOTION TO DISMISS

STATE OF NEW YORK:
ss
COUNTY OF E R I E:

LOIS MUCK, being duly sworn, deposes and says:

1. I am Secretary and Treasurerof the plaintiff Frey Concrete, Inc. I make this supplemental affidavit in further opposition to the defendants' motion to dismiss the complaint and in further support of plaintiffs' motion to serve an amended complaint more adequately setting forth the jurisdiction of this Court and plaintiffs' claims against defendants.

Supplemental Opposing Affidavit of Lois Muck.

2. I conducted an examination of a limited number of defendants' sales invoices for the purposes of ascertaining the relationship of the sales to interstate commerce. My examination was limited by time although I was available to conduct an examination on Wednesday and Thursday of last week, defendants would not permit us to commence until Friday on which day I was unable to be present. As a result, I did not commence my examination until Monday, August 11, at 2:00 P.M. which was the time set by defendants, and I continued to 4:30 P.M. I also conducted said examination on Tuesday and Thursday from 2:00 P.M. to 5:00 P.M. I was unable to conduct the examination on Wednesday because of a meeting in Syracuse of a state-wide industry association which I was required to attend.

3. In view of the limited time available, and the great amount of records to be examined, I could do no more than conduct a spot check of certain of the records relating to the connection of defendants' sales to interstate commerce. I conducted a spot check for the years 1970 and 1974. I am unable to conduct a more comprehensive search of those years or a search of the other years involved, because the Court has requested that all papers be finally submitted by Monday, August 18, and I am engaged in dictating this affidavit on Friday, August 15.

4. However, the limited spot check which I was able to make demonstrated that defendant, Pine Hill, is like Frey Concrete, heavily engaged in supplying concrete directly for products shipped in interstate commerce and for projects which are vitally and directly connected with interstate commerce.

Supplemental Opposing Affidavit of Lois Muck.

5. During my spot check of the year 1970, I found that some of these projects connected with interstate commerce for which Pine Hill supplied concrete during 1970:

Job	Contractor	Connection with Commerce
Concrete for casting highway embankment supports.	Cable Guide Railing Construction Co. Inc.	The concrete involved was used to cast the interlocking support members most of which are shipped out-of-state for use in supporting embankments above highways and similar type installations. I have been informed that over 50% of these cast concrete members are shipped to Pennsylvania.
Reconstruction and enlargement of Buffalo International Airport, including construction of West Terminal and enlargement of East Terminal.	Depew Paving Company, Stimm Associates, Inc., Tri Delta Construction Corp., and Rekoon Construction Co.	Both Allegheny Airlines and Eastern Airlines utilizying the new West Terminal serve Toronto, Ontario, and Allegheny Airlines, Eastern Airlines, United Airlines and American Airlines, as well as other private and charter aircraft, serve major out-of-state cities, as well as foreign airports.
United Parcel Service Freight Terminal.	Fornasiero Brothers	UPS operates a national small parcel delivery service on a land and air basis, and the Freight Terminal at Buffalo sends and receives freight throughout the United States.
New York Telephone Company Baseline.	Wright & Kramer	Interstate telephone service.

Supplemental Opposing Affidavit of Lois Muck.

Job	Contractor	Connection with Commerce
Buffalo and Ft. Erie Peace Bridge Authority (Peace Bridge).	Stimm Associates	Peace Bridge is the largest port of entry on the Canadian border and includes customs, immigration, communications, freight yards and other facilities connected with foreign commerce.
Consolidated Freightways Freight Terminal.	United States Steel Corporation	Interstate freight common carrier.

6. My spot check for the year 1974 also showed that defendants' activities connected with interstate commerce included the following jobs for 1974:

Job	Contractor	Connection with Commerce
Buffalo International Airport.	John W. Cowper, Tri Delta Construction Corp., and H. F. Darling & Co.	Buffalo International Airport reconstruction and improvement of airport. International Airport serves Canada and other States (See fuller description above).
Penn Central Railroad Overpass.	Union Concrete Company and R. L. Vogel Company	Main line of Penn Central Railroad and servicing Penn Central, Amtrack and other trains carrying interstate and international passengers and freight.
United States Post Office.	Saviola Masonary Corporation	Main United States Post Office facilities.

Supplemental Opposing Affidavit of Lois Muck.

Job	Contractor	Connection with Commerce
Buffalo and Ft. Erie Peace Bridge Authority. Peace Bridge exit connection with New York State Thruway.	--	International Peace Bridge between Ontario and New York State. (See fuller description above).
Greyhound Bus Service facility.	Fornasiero Brothers	Greyhound is an authorized interstate common carrier of passengers and freight.
New York State Thruway Authority ramp reconstruction.	--	Interstate 90 Highway connecting New York State with other States and Canada.
Niagara Falls Air Force Base.	Buscaglia and Destro Construction Company	United States Air Force Base and International Airport.
Erie-Lackawanna Railroad operating facilities.	--	Interstate Railroad.
Erie Marine Basin Buffalo Harbor installation.	Fornasiero Brothers	Buffalo Harbor facilities.
International Railway Bridge, Squaw Island.	Stimm Associates	Railroad bridge linking Canada and the United States used by Canadian National Railways, Grand Trunk Western Railways and Penn-Central Railroad.

Supplemental Opposing Affidavit of Lois Muck.

Job	Contractor	Connection with Commerce
Buffalo River Bridge.	Oakgrove Construction Co.	Movable Highway Bridge over navigable water to Buffalo River utilized by interstate and international Great Lakes steamers.
Buffalo Skyway Bridge.	O'Connell Electric Company	High Bridge bridging Buffalo River at elevations to allow passage of interstate and international Great Lakes steamers.
Canadian National Railway and Grand Trunk Western Railway System, Niagara Street yards.	--	International Rail Yard of major Canadian Railroads and Penn Central Railroad.

7. It thus appears that from my spot check of the Pine Hill records in the brief time available, that Pine Hill, like Frey Concrete, is heavily engaged in supplying industries engaged in interstate commerce and in shipping concrete products in interstate commerce. I have been informed and believe that the other companies on the Niagara Frontier manufacturing ready-mix concrete similarly also sell a substantial proportion of their ready-mix concrete in the same or similar projects. We will be unable to definitely ascertain this until we complete our intended discovery of the records of the other competing companies, which we intend to do after we complete our examination of Pine Hill's records and our depositions of Pine Hill personnel.

Supplemental Opposing Affidavit of Lois Muck.

8. In the accompanying affidavit of James J. Neill, Jr., it appears that Mr. Neill has developed that Pine Hill, like Frey, imports hundreds of thousands of dollars worth of materials used in its concrete directly from Canadian and out-of-state manufacturers.

9. It may not clearly appear to the Court, and I would like to point out, that almost 100% of the cement used by the concrete companies in the Western New York area is manufactured in Canada or in Michigan. The companies from which the cement is purchased, namely: Northeast Cement Company, Huron Cement Company, Wyandotte Cement Company, etc. are owned by the Canadian or wholly-owned subsidiaries of the Canadian producers of the cement, except that Huron Cement Company is a subsidiary of National Gypsum Company.

10. As our discovery continues, we desire to examine Pine Hill's records and its officers, as well as any other third party witnesses as may be necessary to determine the effect of Pine Hill's dominance of the market and its dominant purchasing power for raw cement, and whether it obtains any economic advantage, discount, rebate, benefit or other consideration which is not enjoyed by us or by other customers of said cement companies on an uniform basis.

11. It appears to us that Pine Hill is enjoying some type of benefit or advantage because it is consistently underselling us by several dollars per yard even though it claims it pays the same prices for its materials, and even though we operate under the same labor contract, and have similar fixed

and variable costs for raw materials, equipment and services. In addition, Pine Hill has maintained a 1971 concrete price of $22.00 per yard through 1974 in the face of staggering increases, which they themselves have called "double digit inflation" which prevent us from competing with them.

12. For example: As previously cited in my affidavits previously submitted, the break-even cost of a yard of concrete in 1974 after taking into account the increased costs of cement, wages, energy, fuel, equipment, aggregates and other supplies would have been in excess of the $22.00 price which Pine Hill also uses. We were forced to raise our price to approximately $25.00 just to attempt to break even. However, with Pine Hill maintaining its below-cost price, we had to reduce our prices down to $23.70 a yard which is a loss price, in order to attempt to maintain our few remaining customers for this concrete. However, Pine Hill continues to offer trucking advantages, waiting-time advantages which could amount to several dollars per yard of concrete.

13. Accordingly, either Pine Hill is deliberately selling far below cost, or is enjoying some price or merchandise advantage or benefit which we are not receiving. Accordingly, it is necessary for us to carefully examine their cement purchasing power and the prices and benefits resulting therefrom to determine if this is one of the areas which they are utilizing to drive us out of business.

Supplemental Opposing Affidavit of Lois Muck.

14. I wish to reiterate that the Niagara Frontier area constitutes an unique market for ready-mix concrete and for the sale and purchase of the components thereof. I believe that Pine Hill is using all of its efforts to dominate this market and to drive all of the other competitors out of this market following which it will then raise its prices to a normal and profitable level. There can be no other explanation for Pine Hill's sales of concrete far below its cost.

15. From our previous affidavits, it appears that Pine Hill is subsidizing these loss operations from landfill operations and garbage dumping operations to the extent of a $500,000.00 per year. This should indicate to the Court the value to Pine Hill, of the market which it is seeking to dominate, and I ask the Court to consider that if we are driven out of business by Pine Hill's continuing sales at below-cost prices, Pine Hill will almost completely dominate the Niagara Frontier and the Buffalo Port of Entry and the market connected therewith.

16. It is difficult for us to assess the full scope of defendants' predatory activities which have the obvious intent and effect of driving us out of business. The fact that defendants were using a $22.00 per yard price at a time when the cost of production of a yard of concrete exceeded $22.00 is proof on its face that defendants are deliberately undercutting us.

Supplemental Opposing Affidavit of Lois Muck.

17. Our discovery to date has disclosed that plaintiffs are subsidizing this loss operation by the following tactics:

A. Up to $500,000.00 per year subsidy from defendants' landfill, gravel and other operations;

B. Profits from defendants' overpriced gravel sales to us; and

C. Apparently, defendants are obtaining rebates, premiums, discounts or benefits, which we are not obtaining, from our cement and raw material suppliers, or some other benefit which is enabling them to undercut our actual cost of production.

18. In addition, our discovery to date has developed that in addition to undercutting us with a $22.00 per yard price, defendants are enticing away our customers by tying long-term extensions of credit, free fill, free waiting time, and other benefits in consideration of utilizing defendants' ready-mix concrete to the exclusion of our concrete.

Supplemental Opposing Affidavit of Lois Muck.

19. In addition, our discovery has developed that defendants invested in contractors so as to tie the contractors, as customers, to exclusive dealing arrangements with Pine Hill to the exclusion of plaintiffs. An example of this is Queen City Ready-Mix Company which was formed by defendant Pfohl, possibly using financing provided by defendant Kahle, and later acquired by defendant Kahle. The Queen City arrangement tied all of the Queen City customers to Pine Hill in an exclusive dealing arrangement in violation of the Clayton Act.

20. All of these anti-competitive activities of Pine Hill have the intent, and effect, of driving us out of business so as to obtain a monopoly for Pine Hill in the Buffalo, Western New York, and Niagara Frontier markets, in the sale of ready-mix concrete, and in the importation of cement, so as to enable Pine Hill to then control said markets and the sale and price of ready-mix concrete, without any substantial competition. These traditional markets will then be dominated by, and the wrongful property of Pine Hill, and the result will be an elimination of competition in those markets and in this area.

Lois Muck

Lois Muck

Sworn to before me

this 18th day of August, 1975.

F. TERRY SZYMCZYK
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19

Supplemental Opposing Affidavit of
James J. Neill, Jr.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, Deceased,

Plaintiffs,

vs.

CIVIL NO.
1970-277

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

SUPPLEMENTAL AFFIDAVIT
OF
JAMES J. NEILL, JR.
IN OPPOSITION TO MOTION
TO DISMISS.

STATE OF NEW YORK:
ss
COUNTY OF E R I E:

JAMES J. NEILL, JR., being duly sworn, deposes and says:

1. I am Vice President of the plaintiff Frey Concrete, Inc. I make this supplemental affidavit in further opposition to the defendants' motion to dismiss the complaint and in further support of plaintiffs' motion to serve an amended complaint more adequately setting forth the jurisdiction of this Court and plaintiffs' claims against defendants.

Supplemental Opposing Affidavit of James J. Neill, Jr.

2. On Tuesday, August 5, 1975 I was advised that Magistrate Maxwell had authorized plaintiffs to continue with their discovery of the books and records of defendant Pine Hill Concrete Mix Corp. and I was requested by the attorneys for the corporation to hold myself available to conduct the examination immediately after defendants' attorneys notified us that we could proceed. I was later informed that defendants' attorneys had informed our attorneys that I could begin my further examination on Friday, August 8, at 2:00 P.M.

3. I commenced my examination at the requested time, 2:00 P.M. on Friday, August 8, 1975 and worked until 4:30 P.M. On Friday, and at the end of each subsequent day, I asked defendants' representatives for the next date and on each case was told I could commence at 2:00 P.M. on the next business day. Accordingly, I continued my examination on Monday, Tuesday and Wednesday, August 11, 12 and 13 from 2:00 P.M. to 4:30 P.M. I was sick on Thursday, August 14, 1975 and unable to continue my examination. On Friday, August 15, I am engaged in dictating this affidavit and also unable to continue my examination. I understand that the Court has called for any additional papers by Monday, August 18, and so the last day of my examination was Wednesday, August 13.

4. For the purposes of my examination, I requested defendants' representatives to furnish me with the following:

Friday, August 8: Records of sales and purchases, including invoices and delivery tickets from April 1, 1974 to August 31, 1974.

Monday, August 11: A. Invoices and delivery tickets for the period April 1, 1973 to March 31, 1974 for Wyandotte Cement and Master Builders additive purchases.

B. Purchase Journal for the period involved. Mr. Moran stated that they did not retain delivery tickets beyond April 1, 1974. Mr. Moran said he was not sure he was authorized to give us the Purchase Journal. However, he would check with Mr. Fuzak. Mr. Moran later told me I could not see the Purchase Journal.

Tuesday, August 12: I asked Mr. Moran for the purchases from W. R. Grace Company, Huron Cement and Rochester Cement for the periods April 1, 1973 to March 31, 1974. Mr. Moran stated there

were no purchases from W. R. Grace Company for that period nor from Rochester Cement.

5. I requested the Purchase Journal from Mr. Moran so that I could determine all of the out-of-state vendors from whom Pine Hill purchased any of its materials or supplies so that I could compute Pine Hill's out-of-state purchases. I was also interested in determining if Pine Hill had received any price differentials, rebates, discounts or other benefits in their cement purchases which we were not accorded by the cement companies. However, in order to do this, it would be necessary for me to examine their Cash Receipts Book and have access to their General Journal and Ledger. These were previously requested of Pine Hill on several occasions but I have been informed that Pine Hill has refused these for my examination. Without these books, it is very difficult to determine what Pine Hill is able to accomplish by its market dominance by reason of its cement purchases.

6. Substantial additional discovery remains to be done of Pine Hill's books and records, leading both to its purchases in interstate commerce, and to its business operations, but I cannot proceed with this investigation in the limited time available and in the limited records which Pine Hill has accorded us. If Pine Hill gave us all of the

categories of records which they requested of us, and which we turned over to them, I would have no problem in readily completing my examination.

7. With these limitations, it is not possible to present a complete picture of Pine Hill's engagement in interstate commerce by reason of its purchases and sales, and of Pine Hill's effect on the supplying industries, the Western New York ready-mix market, and on Frey's business opportunities. However, the limited examination which I was able to conduct on August 8, 11, 12 and 13 showed that Pine Hill makes purchases and imported directly in interstate commerce materials and supplies that I know of, during the five-month period (April 1, 1974 to August 31, 1974) of more than $200,000.00, and additionally purchased materials and supplies manufactured outside of the state and outside of the United States, but delivered from the cement companies' silos in Buffalo or Rochester of an additional amount of $600,000.00 during that same period, or a five-month total of over $850,000.00.

8. If the foregoing five-month figures are annualized for the full year 1974, they would obviously be increased.

9. The following tabulation shows a detail of defendants' purchases during the five-month period April 1, 1974 to August 31, 1974 which were shipped to defendants

directly from outside of the state:

Item	Company and Shipping Point	Approximate Dollar Volume, 5 Months 4/1/74 - 8/31/74	
Pozzolith	Master Builders Company Cleveland, Ohio	$ 17,191.08	
Haydite Light-Weight Additive	Domtar Construction Materials, Ltd. Cookesville, Ontario Canada	$ 2,000.00	
Materialite	Materials Service Corp. 300 West Washington St. Chicago, Illinois 60606	$ 147,129.10	
Cement	Wyandotte Cement Company Mississauga, Ontario Canada	$ 40,582.89	
TOTAL PRODUCED IN AND SHIPPED FROM MICHIGAN, OHIO OR CANADA, APPROX.		$ 207,000.00	per 5-month period.
Cement	Huron Cement Company (Buffalo silo)	$ 251,776.69	
Cement	Rochester Cement Company (Rochester silo)	$ 33,723.92	
Cement	Wyandotte Cement Company (Buffalo warehouse)	$ 373,278.00	
TOTAL CEMENT MANUFACTURED IN MICHIGAN AND CANADA BUT SHIPPED FROM WAREHOUSES AND SILOS IN BUFFALO AND ROCHESTER		$ 658,778.61	per 5-month period.
TOTAL OF ALL CEMENT, ADDITIVES AND LIGHT-WEIGHT AGGREGATE PURCHASES MANUFACTURED OR PRODUCED OUTSIDE OF THE STATE OF NEW YORK, APPROXIMATELY		$ 865,000.00	per 5-month period.

Supplemental Opposing Affidavit of James J. Neill, Jr.

10. The total concrete-raw-material interstate market (consisting of cement, light-weight aggregates and additives) includes the total purchases not only by Frey, and the purchases by Pine Hill (increased to reflect the full year rather than the five-month period we examined), but also the similar purchases by other concrete ready-mix companies located in this area, since they are competing with us and they are part of the same competitive market.

11. We do not have the interstate purchases by these other competitors, and would have to obtain these by pretrial discovery procedures after we complete discovery of Pine Hill's records and our depositions of their officers which we have not yet commenced.

12. However, even by just adding the interstate purchases shipped directly by out-of-state to Frey during 1974 of $278,000.00 (See Affidavit of Lois Muck sworn to July 31, 1975) together with defendants' figures for the five-month period ended August 31, 1974 ov over $200,000.00, a total of approximately $480,000.00 per year is obtained, and would probably be greater if the Pine Hill figures were annualized and the figures of our other competitors were included.

13. Similarly, if we took the 1974 Frey purchases of materials manufactured outside of the state of $940,000.00 together with the Pine Hill total purchases of over $850,000.00,

Supplemental Opposing Affidavit of James J. Neill, Jr.

for the five-month period ending August 31, 1974, it would yield the total of approximately $1,600,000.00 per year, even before annualizing the Pine Hill figures for a full year, and before including the purchases of our other competitors.

James J. Neill Jr.
James J. Neill, Jr.

Sworn to before me this
18th day of August, 1975.

Sally A. Guzzo
Notary Public

SALLY A. GUZZO
Notary Public State of New York
Qualified in Erie County
My Commission Expires March 30, 1976

Letter Dated August 18, 1975 to Judge Curtin from Defendants' Attorneys.

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*ADMITTED IN FLORIDA AS WELL AS NEW YORK

DELIVER

August 18, 1975

Hon. John T. Curtin
United States District Court
United States Courthouse
Buffalo, New York 14202

Dear Judge Curtin:

Re: Frey v. Pine Hill, et al
Civil 1970-277

As To The Insufficiency Of The Complaint

Defendants have recited fully their arguments and authorities demonstrating that the plaintiffs' complaint does not state any cause of action cognizable by this Court and must therefore be dismissed for insufficiency. Despite eight (8) months of opportunity during the pendency of this motion to dismiss, plaintiffs have completely failed to answer or controvert those arguments and authorities.

The complaint must be dismissed for insufficiency.

If plaintiffs seek permission to file an amended complaint by providing the Court and counsel with a proposed amended complaint by August 18 in accordance with the Court's most recent order, defendants will then file papers in opposition to that request. Full response to such an application cannot be made, and therefore will be withheld, unless and until a proposed amended complaint is provided as directed. If such a proposed amended complaint is not provided by August 18, defendants submit they are entitled to have a complete and final termination of this burdensome and meritless suit through a final order of dismissal.

As To Jurisdiction

This action involves allegations and claims in the complaint relating to alleged conduct prior to June 15, 1970.

The jurisdiction of the Court with respect to the claims made is dependent upon a showing of the alleged interstate commerce activities of the parties during the period of allowable recovery under the Statute of Limitations, that is, the four (4) year period immediately prior to commencement of the action in June 1970. Accordingly, allegations of claimed interstate business before that time or after that time have no relevance to the question of involvement in interstate commerce during the period to which the complaint relates. On this score, the record is totally devoid of any factual information demonstrating that any of the parties engaged in the sale of concrete, gravel, sand or any other products in interstate commerce. Nor is there any factual information demonstrating that the claimed conduct of the parties had--during the relevant period--any substantial affect on interstate commerce.

Plaintiffs studiously avoid addressing themselves to the time period to which their complaint relates. Instead, the Court is literally inundated with accusations, claims and alleged factual information relating to the present--none of which establish or could support a finding of interstate commerce during the period made relevant by the complaint. Mrs. Muck's most recent affidavit--that sworn to on July 31, 1975--is a case in point. That affidavit purports to provide information concerning plaintiffs' activities in 1974 and 1975--activities which, of course, have no relevance to a determination of whether the activities complained of in the complaint between 1966 and 1970 in any way involved or affected interstate commerce.

Moreover, despite all the juggling with figures, there is nothing in that affidavit or in anything before the Court to show that any conduct on the part of defendants has any affect whatsoever on the flow of Portland cement or anything else in interstate commerce.

Inasmuch as plaintiffs have been given yet another opportunity to file more papers with the Court, defendants will undoubtedly desire to file responsive papers, and Mrs. Muck's July 31, 1975 affidavit will also be dealt with.

As To Summary Judgment

The essential basis of plaintiffs' complaint is the assertion that defendants refused to supply gravel to plaintiffs at preferential prices and that without gravel from defendants plaintiffs cannot continue in business.

The affidavits submitted on this motion by defendants establish beyond dispute that:

1. There are untold resources of gravel in the Erie County area which are as available to plaintiffs as to defendants.

2. That plaintiffs by their own election declined to retain or to obtain available gravel lands.

3. That plaintiffs in fact have their own very substantial gravel resource at their Alexander gravel plant.

4. That plaintiffs have obtained gravel from other suppliers and have effectively competed with defendant Pine Hill.

The Court will surely recollect the repeated claims by plaintiffs in affidavit after affidavit, and indeed even in testimony to the Court by Mrs. Muck, that plaintiffs must have gravel from defendants at discriminatory prices or be forced out of business. That these are and have been false cries of "Wolf" is conclusively established by the fact that since this Court's Order earlier this year not requiring such sales, plaintiffs have purchased no gravel from defendants but have actively and successfully competed in the ready-mix concrete business.

The affidavits filed by defendants on this motion, and the materials specifically referred to in them, establish defendants right to summary judgment.

Respectfully submitted,

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

By Victor T. Fuzak

Victor T. Fuzak/SKW

VTF:skw

Copies to: Arnold Weiss, Esq. ✓
Victor E. Manz, Esq.
Mr. Norman M. Moran

Decision of November 10, 1975.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

vs. Civil 1970-277

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. [illegible]V, JOSEPH PFOHL, PAUL M. P[illegible] and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN (ARNOLD WEISS, ESQ., of Counsel) Buffalo, New York, for Plaintiffs.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR (VICTOR T. FUZAK, ESQ., of Counsel) Buffalo, New York

and

MANZ & MANZ (VICTOR E. MANZ, ESQ., of Counsel), Buffalo, New York
for Defendants.

The complaint in this action was filed on June 17, 1970. An answer was filed promptly on July 28,

1970. Following that, however, when discovery was delayed in 1971, the court entered several orders attempting to spur preparation of this case. Nevertheless, plaintiffs' counsel and defendants' original counsel agreed to a number of adjournments of the taking of depositions or the examination of documents. Defendants' original counsel died in the spring of 1974 and was replaced by the present defense counsel. In January 1975 defense filed the present motions which are before the court for decision.

The defendants move, pursuant to Rule 12 of the Federal Rules of Civil Procedure, for an order dismissing the complaint for failure to state a claim, and pursuant to Rule 56 for summary judgment. Because numerous affidavits have been filed and depositions taken, the primary motion before the court at present is one for summary judgment. However, because these additional papers did not substantially change or add to plaintiffs' original theory, the grounds for granting either motion are quite similar.

After receiving affidavits from plaintiffs, I heard oral argument from the parties on May 12, 1975. At

that time, when it appeared to me that plaintiffs had failed to respond to defendants' affidavits addressed to the antitrust aspect of this case, plaintiffs' counsel requested time to file a further brief and affidavits and to supply a proposed amended complaint with a motion to amend. He represented that his brief and motion to amend the complaint would be filed within a few weeks. On August 4, 1975, after he had failed to submit a brief, the further affidavits or the proposed amended complaint, I filed a further order in which I indicated that defense arguments were substantial and strongly persuasive that the complaint should be dismissed, but permitted plaintiffs' counsel until August 18 to make a further filing. On August 19, 1975, the plaintiffs filed affidavits of Lois Muck, secretary and treasurer of plaintiff Frey Concrete, Inc., and James J. Neill, Jr., vice president of Frey Concrete, Inc. They filed with those affidavits a memorandum of law and a motion seeking to amend the complaint without attaching the proposed amended complaint.

The following constitutes the court's decision on the pending motions.

Decision of November 10, 1975.

The plaintiffs' complaint asserts six causes of action. The essential facts are laid out in the first cause, which is allegedly brought under the Sherman Anti-Trust Act, 15 U.S.C. §1 et seq., and the Clayton Act, 15 U.S.C. §12 et seq. According to the complaint filed by the plaintiffs, it is alleged that plaintiffs and defendants are competitors in the Western New York area in the sand, gravel and ready mix concrete business, and are engaged in interstate commerce. (¶¶ 9 and 12.) However, the allegation of interstate commerce activity is set forth only in a general and conclusory fashion. In May, 1949 plaintiffs sold to "defendant Pfohls" 100 acres in the Town of Lancaster, excluding plaintiffs' ready mix plant which was on the premises. (¶18.) The parties agreed that the Pfohls and their successors would continue to sell to plaintiffs all the gravel required by plaintiffs for their ready mix plant, that they would supply the ready mix plant at a price which would be the prevailing pit price in the area, and that this price would be fixed by agreement on February 1 of each year, with a discount of 20%. (¶19.) The plaintiffs then allege that the defendants wrongfully violated

the terms of the agreement for the purpose of acquiring plaintiffs' business at a depressed price. (¶22.) On August 1, 1957 defendants Kahle and Pine Hill purchased all the stock of Pfohl Brothers and dissolved Pfohl Brothers on August 26, 1957. (¶23.) According to plaintiffs' complaint, because of the action of the defendants, plaintiffs' former premises reverted to plaintiffs because of defendants' failure to comply with the conditions of the contract. (¶24.) Following this, plaintiffs charge that on May 1, 1969 Pfohl Brothers recorded a belated deed ostensibly dated August 31, 1957, purporting to convey to defendant Regent the premises originally owned by plaintiffs and sold by plaintiffs to defendant Pfohls in May 1949. (¶25.) In ¶27 of the complaint, the plaintiffs allege that the defendants have refused to perform the agreement of May 1949; that they raised the price of gravel to plaintiffs over "the prevailing pit price" making it impossible for plaintiffs to compete against the defendants; refused to afford plaintiffs the discount agreed upon; refused to deliver gravel to plaintiffs' plant; began an action in the Supreme Court

of the State of New York for the purpose of harassing plaintiffs and made attempts to purchase plaintiffs' business for a depressed consideration. (¶27.) Plaintiffs charge that all these actions were a part of a conspiracy among the defendants Kahle, Pine Hill and Regent to obtain a monopoly in the production of gravel and ready mix concrete. (¶28.) The plaintiffs seek damages and an injunction.

The other claims are premised on the same facts. The second alleges a violation of the New York General Business Law (¶31); the third a breach of contract (¶¶ 32 through 35); the fourth seeks an order directing the defendants to deed back to plaintiffs the property deeded on May 17, 1949 (¶¶36 through 39); the fifth requests a declaratory judgment stating that the plaintiffs are the owners of the real property (¶¶41 and 42); and finally, the sixth is a catch-all claim referring to all the prior paragraphs and seeking an injunction and money damages.

A complaint is not subject to dismissal unless it appears to a certainty that no relief can be granted under any set of facts which can be proven in support of

its allegations. Conley v. Gibson, 355 U.S. 41, 45 (1957).

In a motion for summary judgment, the burden is on the moving party to establish that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. When the moving party has supported his motion with proper affidavits or other materials, his opponent, to defeat summary judgment, must set forth by affidavit or otherwise specific facts showing that there is a genuine issue for trial. Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co., 381 F.2d 245 (4th Cir. 1967); Dressler v. MV Sandpiper, 331 F.2d 130, 131-135 (2d Cir. 1964).

The record in this case reveals that the defendants have sufficiently overcome the obstacles to warrant granting a motion under either Rule 12 or Rule 56. There are many reasons why defendants' motions for dismissal of the complaint and for summary judgment must be granted. First of all, many of the allegations contained in the complaint refer to events which occurred long before June, 1966. Although these activities may be considered as part

of the history, the plaintiffs are barred by the statute of limitations from claiming any damage for activities which occurred before that date. 15 U.S.C. §15(b). More important, a generous reading of the complaint may reveal a cause of action for breach of contract, but not a violation of the antitrust statutes. There is nothing in the complaint to reveal alleged conduct "in restraint of trade or commerce among the several states, or with foreign nations." 15 U.S.C. §15. The complaint does not set forth the relevant market involved or the proportion of the market which it is claimed the defendants control, or the facts which reveal an unlawful conspiracy or combination. The essence of the complaint is that defendant Pine Hill has allegedly refused to continue to sell gravel and concrete products to plaintiffs at a preferred discount price from the price charged by defendant Pine Hill to competitors of plaintiff. There are no facts pleaded to show that either plaintiffs or defendants directly or indirectly engaged in interstate commerce.

To state a cause of action, either under the Sherman Act or the Clayton Act, plaintiffs must plead

ultimate facts in support of conclusory allegations of conspiracy or combination in restraint of trade before the complaint may be allowed to stand. It is not enough merely to plead factual or legal conclusions. Sandidge v. Rogers, 156 F.Supp. 286 (S.D.Ind. 1957). Notice pleading in the antitrust field is not sufficient. See Nelson Radio and Supply Co. v. Motorola, 200 F.2d 913 (5th Cir. 1952). Considering this complaint as one alleging a violation of the Clayton Act only, the transactions complained of must be in interstate commerce and substantially lessen interstate commerce. The plaintiffs must allege facts which show the products to which the alleged illegal conduct relates, traveled interstate. See Standard Oil Co. v. F.T.C., 340 U.S. 231 (1951). Plaintiffs do allege that some of the products were used for the construction of interstate highways, landing strips, bridges between Canada and the United States and the like, but this is clearly not sufficient when considered in the light of the Supreme Court decision in Gulf Oil Corp. v. Copp Paving Co., Inc., 42 L.Ed.2d 378 (1974). When the complaint is considered in relation to the Sherman Act,

the recent comments of the Second Circuit, which quoted an excerpt from another case with approval, are appropriate:

> [T]he test of jurisdiction [under the Sherman Act] is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business.
> Lieberthal v. North Country Lanes, Inc., 332 F.2d 269, 272 (2d Cir. 1964).

The affidavits supplied by plaintiffs in this action relate only to the claim of breach of contract by the defendants, but do not set forth in any way any facts which indicate an interstate activity under either of the antitrust statutes. The affidavits supplied by the parties and the depositions filed failed to set forth facts revealing any further interstate activity or an effect on commerce sufficient to allow this action to proceed.

This court has no jurisdiction over claims 2 through 6, because there is no diversity of citizenship between the parties. Since the first claim fails, the

others must also. Defendants' motion to dismiss the cause of action for failure to state a claim pursuant to Rule 12, and for summary judgment pursuant to Rule 56, are granted. The Clark is directed to file a judgment dismissing the complaint.

So ordered.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: November 10, 1975

Judgment Dismissing Complaint.

JUDGMENT ON DECISION BY THE COURT — CIV 32 (7-63)

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 1970-277

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors etc.

vs.

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, etc.

JUDGMENT

This action came on for ~~trial~~ (hearing) before the Court, Honorable John T. Curtin, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that this court has no jurisdiction over claims 2 through 6, because there is no diversity of citizenship between the parties. Since the first claim fails, the others must also. Defendants' motion to dismiss the cause of action for failure to state a claim pursuant to Rule 12, and for summary judgment pursuant to Rule 56, are granted.

Dated at Buffalo, New York, this 10th day of November, 1975.

JOHN K. ADAMS

JOHN K. ADAMS
Clerk of Court

615

SERVED BY ☐ PERSONALLY
DATE 11/5/75

Notice of Appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE C. FREY READY-MIXED CONCRETE, INC., GEORGE C. FREY BATCHING PLANT, INC., and HERBERT FREY and LOIS MUCK as co-executors of the Estate of GEORGE C. FREY, deceased,

Plaintiffs,

vs.

PINE HILL CONCRETE MIX CORP., REGENT SAND & GRAVEL CORP., LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M. PFOHL and FIDELIS H. PFOHL, individually and as the controlling and surviving Directors, Officers, Shareholders, Liquidators and Receivers of the assets of PFOHL BROTHERS, INC., a dissolved corporation, and PFOHL BROTHERS, INC.,

Defendants.

Civil 1970-277

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that plaintiffs above named hereby appeal to the United States Court of Appeals for the Second Circuit from the final Decision, Order and Judgment dated November 10, 1975 of the United States District Court for the Western District of New York granting defendants'

88

Notice of Appeal.

Motion to Dismiss the Complaint and for summary Judgment, and directing the Clerk to file a Judgment dismissing the Complaint, and dismissing the Complaint, entered in this action on the 10th day of November, 1975.

PLEASE TAKE NOTICE that plaintiffs appeal from each and every part of said Decision, Order and Judgment, as well as from the whole thereof.

Dated: Buffalo, New York
December 3, 1975.

RAICHLE, BANNING, WEISS & HALPERN

By _____
Arnold Weiss
A Member of the Firm
Attorneys for Plaintiffs
10 Lafayette Square
Buffalo, New York 14203
Telephone: 716 852 7587

TO: JOHN K. ADAMS, Clerk
United States District Court
Western District of New York
United States Courthouse
Buffalo, New York 14202

VICTOR T. FUZAK, ESQ.
HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR
Attorneys for Defendants
1800 One M & T Plaza
Buffalo, New York 14203

JEC:HH:5
3-5-73

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

- -

GEORGE C. FREY READY-MIXED CONCRETE, INC.,
GEORGE C. FREY BATCHING PLANT, INC; and
HERBERT FREY and LOIS MUCK as Co-Executors
of the ESTATE OF GEORGE C. FREY, Deceased,

Plaintiffs,

-vs- Civil Action
No. 1970 -

PINE HILL CONCRETE MIX CORP.,
REGENT SAND & GRAVEL CORP.,
LUDWIG F. KAHLE, JOSEPH PFOHL, PAUL M.
PFOHL and FIDELIS H. PFOHL, Individually,
and as the controlling and surviving
Directors, Officers, Shareholders,
Liquidators and Receivers of the assets of
PFOHL BROTHERS, INC., a dissolved corporation,
and PFOHL BROTHERS, INC.

Defendants.

- -

Examination before trial of HERBERT FREY, held before James E. Crosby, Notary Public, at the Statler Hilton Hotel, Buffalo, New York, on Monday, March 5, 1973, commencing at 11:00 a.m. pursuant to notice.

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN
BY: ARNOLD WEISS, ESQ.,
Attorneys for the Plaintiffs.

MANZ, MANZ & DIVIAK
BY: VICTOR E. MANZ, ESQ.,
Attorneys for the Defendants.

MR. MANZ: The usual stipulations?

MR. WEISS: Yes.

MR. MANZ: Fine.

MR. WEISS: I think maybe we would like to read over the deposition before it is filed and make sure if there are any changes because you will likely get into some technical terms or figures and this is in no way indicating the reporter is not accurate, but to make sure that we get the accurate answers --

MR. MANZ: All right.

H E R B E R T F R E Y, having first been duly sworn, was examined and testified as follows:

EXAMINATION BY MR. MANZ:

Q. Mr. Herbert Frey, what is your capacity with George G. Frey Ready-Mixed Concrete, Inc.?

A. Right now, I am President.

Q. All right. Is that "Company", or "Corporation" still in an Estate?

* * *

Q. Did your mother?

A. No.

Q. All right. Now, did there come a time when your father did not operate the business for a period of years?

A. I couldn't say that there was ever a time when he didn't operate the business.

Q. Well, was there a time when he was out of the State and not able to operate physically the business?

A. Anything, any major thing that happened, it had to be communicated to him by telephone and he ran the business from wherever he was.

Q. I see. But the question I asked you was, was there a time when he was not in the City and he was actually not operating the business?

MR. WEISS: I will object to that and instruct the witness not to answer. It has been answered already. He answered this. He said he hasn't. Now you are repeating the question and insisting on it. Now, you have the testimony and I should think that would be it.

MR. MANZ: Are you objecting to the question?

MR. WEISS: I object, and I suggest that we go on to another line of inquiry and ask a different question.

MR. MANZ: Well, for the record, Mr. Frey, I feel did not answer the question and I am now ready to break the question down into two parts.

MR. WEISS: If you would like to try a different question; he told you his father ran the business from wherever he was. Now if you want to know if he was in Poughkeepsie one day or one month, or if he was in Austrailia or wherever he was, he said he ran the business and any decision was communicated to him by telephone. If you want to go from there, I have no objection, but I don't see why we should go back. This will be a long set of depositions on both sides.

MR. MANZ: All right. I will proceed. I will expand on it.

BY MR. MANZ:

Q. Was there a time when your father actually did not devote all of his time to the management of the corporation, the ready-mixed business?

MR. WEISS: You mean after he retired, or --

MR. MANZ: No, shortly after.

MR. WEISS: Give us a year.

BY MR. MANZ:

Q. During the years 1954, 1955 and 1956, was your father not living in the Erie County Area and not actually running the business?

MR. WEISS: What do you mean by that? Is there something on your mind? Why don't you say it?

MR. MANZ: Mr. Weiss, I see we are starting on our track. I think the usual way to note an objection is by saying, "I object to the question", and I am going to --

MR. WEISS: I object to the question.

MR. MANZ: I also object to your testifying and trying to divert me from asking the questions the way I want them, and I think they are proper. I know they are proper.

MR. WEISS: I think you are afraid to ask it in a way --

MR. MENZ: I am not afraid of you or anybody else.

MR. WEISS: Why don't you ask him? Be a man about it and say what you mean to say.

MR. MANZ: Why don't you stop that. I thought the Magistrate told you to stop this foolishness.

MR. WEISS: If you want to ask a question that you are embarrassed to ask -- either ask it or don't ask it.

MR. MANZ: I will ask the questions the way I want to and you are not going to tell me how to ask them. Now, let's get that straight once and for all. You are not going to put any acts on for the benefit of your client.

MR. WEISS: You name the City and the time and stop horsing around.

BY MR. MANZ:

Q. While your father was in jail, Mr. Frey, who ran the business?

A. At that time, there was my mother, myself and

my sister and any major decisions that had to be reached upon visitation, we would communicate with him, and he would make up his mind and let us know.

Q. All right. So, in other words, while he was in jail, he actually ran the business; is that right, and made all the major decisions?

A. Fundamentally, yes.

Q. All right. Now, during what period of time was that?

A. I can't answer that truthfully, the period of time that he was in jail. I can get it for you, but I just don't remember.

Q. All right.

A. The year.

Q. All right.

A. I am poor on numbers and that type of stuff. Some stuff I will remember quite vividly and some just doesn't stick.

Q. All right. Now, just prior to the time that your father went to jail, who was responsible for the bookkeeping and the accounting?

A. We hired a man named Tepfer. He run the account-

ing and layout of the accounting system and the whole bit. That is prior to him being in jail and I believe as the Court proceedings were taking place, just prior to us starting, he passed on.

Q. I see.

A. Which went bad.

Q. I see. So he was the one that prepared the audits and so forth that would indicate whether you were making any profit or loss in the conduct of your business; is that right?

A. Yes, Ralph Tepfer, as I remember his name.

Q. All right. Now, you started that business, you incorporated, and this business went along until last year when the name was changed. Now, did you own any other, you and your mother, did you own any other businesses or corporations at the same time?

A. Would you phrase that question -- in between what years, Mr. Manz?

A. Well, from the time dad started the business; give me a list of all the businesses or companies that he owned?

A. Well, owning, the only real companies he owned is Frey Batching Plant, Incorporated and I believe it is "George C. Frey Batching Plant, Incorporated", and there was "George C. Frey Ready-Mixed Concrete, Incorporated".

Q. All right.

A. And later on we started a "Frey Sand & Gravel Incorporated" -- what was the question?

Q. How many companies or businesses, whether they are corporations or --

A. That my father and mother --

Q. or you and your sister, or anybody in the family owned and operated simultaneously with the Ready-Mixed Company?

A. Well, that was all that my father would have been involved in.

Q. How about your mother?

A. She was involved in the same corporations; yes.

Q. Any others?

A. There was one other corporation, that is, Material Service Corporation, but that, my father never had any connection with.

Q. Okay.

What kind of corporation was that? What kind of business were they involved in?

A. That is where, fundamentally, we have equipment and in the sand and gravel business we were the ones that usually done the excavating and supplying of the raw materials to the washing plant, usually handled the stripping and occasionally we rented out equipment. It is more or less an equipment business.

Q. And is still in operation?

A. Yes, it is.

Q. In existence?

A. Yes, it is.

Q. Is it active?

A. Yes.

Q. Who are the officers?

A. Mysalf and my sister.

Q. And where are the books kept for this corporation?

A. Pavement Road. 561 Pavement Road.

Q. All right. Is Frey Sand & Gravel, Inc., a holding company for land, gravel land and sand land?

MR. WEISS: In what sense do you mean "holding

or sand; grit or gravel?

A. Sand, grit or gravel.

Q. All right. That is of your own personal knowledge?

A. Yes.

Q. How do you know that?

A. Because the rock is right up to the surface on the bunch of them; all of them.

Q. All right. And that is rock, that is something that can be used as aggregate?

A. I believe it can be used, yes.

Q. What do you call it, technically?

A. Well, that would be called limestone.

Q. And that is used in the business after it is crushed?

A. Well, if it was properly processed, it could be used in, as a quarry, you could quarry it, if you could get a permit.

Q. All right. And is this why it was purchased?

A. This was the ultimate goal; yes.

Q. And how long have you owned this property?

A. I truthfully couldn't tell you. I could find out for you.

Q. Is that one of the companies that you are now associated with that owns this property?

A. Pardon?

Q. Does one of the companies that you are associated with own this property that we just mentioned with the stone on it?

A. Yes.

Q. Okay. Now, are there any other pieces of property other than the ones we have discussed, that you have, that are owned by anybody in the family, or any of the companies that they are associated with, upon which there is some sort of aggregate?

MR. WEISS: You mean anything he can think of now?

MR. MANZ: Well, he would know.

THE WITNESS: No.

BY MR. MANZ:

Q. Other than the property in Genesee County, do you or any members of your family, or any companies with which they are associated, that you are associated wtih, own any lands upon which there is gravel, grit or sand?

A. Well, yes. It just come to mind, there is one

Q. Now, Mr. Frey, can you tell me what lands Frey Sand & Gravel owns?

A. Well, the premises that the sand and gravel plant is on is owned by us. We own the driveways or the property that leads to and from the sand and gravel plant to Broadway. We own an adjoining piece of land -- wait a minute. I will withdraw that. We own an additional piece of land adjoining the sand and gravel going straight south, strictly a driveway or a road.

Q. Where?

A. Pardon?

Q. Give me the locations as you go along.

A. All of that is in Alexander, New York.

Q. All right.

A. I believe that would consist of, fundamentally, all the land that the Sand & Gravel owns.

Q. All right. Does the Frey Sand & Gravel Corporation have leases other than ownership?

A. Yes, they do.

Q. And is this in Alexander, County of Genesee?

A. Yes.

Q. Okay. And could you tell me some of the names of the leases that you have?

A. Well, I can give you a few of them, I believe. There is a lease with Kreuder Farm.

Q. Could you give me the acreage, approximately, as you go along?

A. No, I couldn't. I couldn't in any of these cases. I am not sure.

Q. All right.

A. And there is a -- I can't think of the man's name, Wate. I don't just know how that would be -- I believe it was "W-A-T-E". There are two of them. There are two Wates'. Both of their farms.

There is a "Merle", "Spring"; that is all I can think of offhand. There might be more, I am not sure.

Q. And could you tell me the approximate number of acres involved?

A. In no case. I couldn't in any one of them.

Q. Okay. Could you tell me the approximate dates of any of these leases?

A. No.

Q. Could you tell me whether any of these leases have options to purchase the land?

A. No, I couldn't tell you. I don't believe so, though.

Q. Do you have the leases in your office, at your main office, copies of them?

A. I believe we do.

Q. Would you bring them with you the next time you come?

A. Copies of the leases?

Q. Yes, or the originals, whatever you have.

A. I suppose we could.

Q. Pardon?

A. I think we could.

Q. Would you bring copies of all the leases that you have for the properties in Genesee County?

MR. WEISS: Tell me exactly what it is you want on the record.

MR. MANZ: We want copies of all the leases that you have for land that has gravel, sand, or any kind of aggregate of any kind used in your business.

MR. WEISS: You want all sand, gravel and aggregate

* * *

THE WITNESS: What do you want to do, Mr. Manz?
What do you want to do?

BY MR. MANZ:

Q. I want you to tell me what lands you do own?

A. I got a little chunk over here in Jewetville.

Q. All right. Is that where the Haydite Company is?

A. Yes.

Q. Okay.

A. Adjoining it.

Q. Does that have any commercial deposits?

A. Not of sand, grit or gravel.

Q. Does it have Haydite?

A. It has Haydite material on it.

Q. Is that an aggregate used?

A. Yes, it could be used, yes.

Q. All right.

A. It is clay, shale clay.

Q. Yes.

A. We have a farm over in Akron.

Q. What do you call that farm; could you identify it by name? Is that the Barraues Farm, the Zola Farm -- what do you call it?

A. Well, yes. That comes in the Township of --

these come under the Township of Newstead. There is the Barraues -- what was the other one you mentioned, the Zola?

Q. Yes.

A. Zola. I bet you got the rest of them. Give them to me. I can't even think of them.

MR. WEISS: Come on, Vic. Cooperate with us. You have the list there.

MR. MANZ: Look, why don't you knock it off, "cooperate".

MR. WEISS: Obviously the witness --

MR. MANZ: I thought the Judge told you to behave? Cut it out.

MR. WEISS: Do you have a list? Give it to him.

MR. MANZ: Why don't you let me do what I want to do, and you do what you want to do. Now, you are trying to throw a road-block into it, that is what you are trying to do.

MR. WEISS: Big deal.

THE WITNESS: The Rudolph Farm.

BY MR. MANZ:

Q. Is that one?

A. Yes.

Q. What other lands do you own, Mr. Frey?

MR. WEISS: He probably owns his house. Do you want to know about that?

MR. MANZ: Farm lands.

MRS. MUCK: Don't forget ours, Herb.

THE WITNESS: Yes, me and my sister own a farm that they live on. Oh, my mother, uncle and aunt, they own a piece together.

BY MR. MANZ:

Q. Okay. Now, you have the Miles Farm; where is that located?

A. That is over there with -- between Zola and Barraues. Miles is in there too.

Q. What road are these farms on? Are they on a specific road?

A. Yes. One of them is -- the majority of them are on -- south of the Thruway and east of the Alden-Crittenden Road and there is a road there that they face on, but I can't think of the name of that road.

Q. Are these all farmlands?

A. Yes.

Q. Okay. Does that include the Klawer Farm also?

MR. WEISS: Could you spell that?

MR. MANZ: K-L-A-W-E-R.

THE WITNESS: Yes. There is a Klawer farm in this bunch, too.

BY MR. MANZ:

Q. And Heiman, H-E-I-M-A-N?

A. Right.

Q. And the Kwandrans land, K-W-A-N-D-R-A-N-S; is that all a part in there?

A. That is "Q-U-A-N-D-R-A-N-S"; yes.

Q. Are these all together, sir?

A. Yes, all in a row.

Q. Approximately how many acres do you own?

A. I couldn't tell you, but it is about a mile long. Will that help you?

Q. How deep; do you have any idea?

A. Between the Thruway and the frontage road which I can't think of the name of it.

Q. All these farms, are they owned by one company or individual, or individuals? Who owns this property?

A. I think that --

MR. WEISS: Don't think about it, Mr. Frey. If you don't know, the records are clear in the County Clerk's Office, they are recorded by deeds, are they not?

THE WITNESS: Yes, they are. Oh, sure.

BY MR. MANZ:

Q. Can you tell me whether or not there have been any tests made on these farms for gravel, grit or other aggregate?

MR. WEISS: This is material to this lawsuit?

MR. MANZ: I think so.

MR. WEISS: Because it works both ways. I will be asking your people the same things.

MR. MANZ: Oh, yes, there is no problem.

MR. WEISS: All right.

THE WITNESS: No. I could clarify that there has been no tests done on any of them, but I am very conscious that there isn't any on them, none of them got anything on them.

BY MR. MANZ:

Q. You say none of these have any? You have personal knowledge that none of these have any grit

company"; in an Internal Revenue sense, or "holding Company" in a stock sense, or do you mean just colloquially?

MR. MANZ: I will rephrase the question.

BY MR. MANZ:

Q. Mr. Frey, would you tell me whether or not Frey Sand & Gravel is still active?

A. Yes, it is.

Q. Okay. And who are the officers, please?

A. Lois Muck and myself.

Q. Okay. Is your mother an officer?

A. I don't believe she is.

Q. All right. Now, could you tell me for what purpose this corporation went into existence?

A. To wash, screen, grade sand and gravel.

Q. Does it also own gravel land, or lands of any kind?

A. Yes.

Q. Okay. Could you tell me, as best you can recall, how many -- what pieces of land does the corporation own and their location?

A. Which corporation?

Q. Frey Sand & Gravel.

MR. WEISS: Again, Mr. Manz, if you just want a description of the land, we will be happy to give it to you, the metes and bounds, or liber and page, or whatever you want, but I don't know if the witness can give this type of thing off-hand. If you want accuracy, which I assume you do -

MR. MANZ: Oh, sure, sure. That is why I am going to ask the questions now and then later we will get that, if that is okay.

MR. WEISS: You can't change the records at County Hall if you are implying anything --

MR. MANZ: No, no.

MR. WEISS: You see, I don't even know what you can --

MR. MANZ: I want to know what he knows. He is an Officer in this corporation.

MR. WEISS: That doesn't mean --

MR. MANZ: Why don't you let him answer the question?

MR. WEISS: That is like asking President Nixon where the Post Offices are.

MR. MANZ: Really? Do you believe that statement?

BY MR. MANZ:

more in Genesee County.

MR. WEISS: The question is, Mr. Frey, other than Genesee County?

THE WITNESS: No.

BY MR. MANZ:

Q. All right. Now, what were you going to tell me about Genesee County? Is there another piece of property you didn't mention before?

A. Yes, there is.

Q. What kind of property is that?

A. That is farmland.

Q. Do you own it?

A. Yes.

Q. Okay. And is it being mined, or is it in reserve?

A. No, it is in reserve.

Q. Do you know how many acres you have there?

A. No, I couldn't tell you, sir.

Q. Okay. What is 1690 Union Road and 1702 Union Road property?

A. Well, I don't know them by numbers, but we used to always refer to our West Seneca Plant as 1700 Union Road.

Q. So that is where you have your other plant; is that correct?

A. That is correct, yes, a ready-mix plant located there.

Q. How many plants, ready-mix, or batching plants do you, or any of the companies that you are associated with own?

A. We just have those two batching locations for transit mix concrete.

Q. Transit mix concrete?

A. Normally, that is transit mix concrete that --

Q. Is that a company?

A. No.

Q. That is where you mix and sell in transit, isn't it?

A. Transit mix is normally --

MR. MANZ: What are those gestures for, Mr. Weiss? I thought that you and I had an understanding?

THE WITNESS: He has a nervous condition. Forgive him.

MR. MANZ: He has something more than that.

MR. WEISS: Mr. Moran and I were just talking to each other.

MR. MANZ: I told you, you pull any of the stunts like you did the last time and I am going to retaliate and I don't mean maybe.

MR. WEISS: You can talk to Mr. Frey. I was having a discussion with Mr. Moran.

MR. MANZ: Any more gestures from you, I want the record to indicate, that I am going to give them right back to you.

MR. WEISS: Well, I was just smiling at Mr. Moran. I wish you would do that.

MR. MANZ: Yes.

MR. WEISS: Let the record show you are not smiling.

BY MR. MANZ:

Q. Just so that I understand it, Mr. Frey, what do you mea. by "transit", the term that you made before?

A. That is a ready mix concrete business.

Q. That is a company?

A. Pardon?

Q. Is that the name of a company?

A. No. That is a process.

Q. A process. All right. So the West Seneca Plant

* * *

to purchase lands upon which there was gravel, grit or sand?

A. I feel I can't follow you. Try again.

Q. Okay.

A. Somewhere I am missing the boat.

Q. All right. What I want to know now, Mr. Frey, is, from that time in May of 1949 when Pfohl Brothers purchased the lands, all those lands under the contract from your father, whether or not anybody else ever came up to you, to your father, that you know about, or to you or members of your family, or any of the companies which the Freys' are involved in, where an offer was made to sell gravel, land that contained gravel, grit or sand?

A. To my father who in turn then sold it to Pfohl?

Q. No. The question I am asking is a little different than I asked you before and that is, do you have any knowledge of any offers ever made by anyone to sell lands that contained gravel, grit or sand after your father had sold the lands to Pfohl Brothers?

A. Well, you are going back to 1949, that is when

we bought the plant and that was all that I believe was bought that year.

Q. All right. Now, did you hear my question?

A. Now, progress from there.

Q. All right. From 1949 to the present time, has anybody ever offered to sell you land that contained gravel, grit or sand, which were actually turned down and not purchased?

A. Offered to us to buy sand, grit and gravel lands?

Q. Yes.

A. We get quite a few of them offers.

Q. Okay.

A. That come in the door and, "I got gravel", and that kind of stuff and like I say, I think everybody that buys gets that kind of a proposition.

Q. All right. So in other words, there have been many times that you are aware of that actually offers have been made to sell you gravel lands?

MR. WEISS: Wait a second. You are boot-strapping something here. That wasn't the question. The question is, if you rephrase that you mean land reputed to have gravel

on it, is that what you mean? Or do you mean land that had gravel on it?

MR. MANZ: I will stick with my question. Would you repeat the question?

(Whereupon, the question referred to was read back by the reporter).

MR. MANZ: He already testified that many offers had been made. He answered the question. I want to know whether there were many or a few, that is what I want to know.

MR. WEISS: I see, but I was trying to find out if you were trying to distinguish between -- apparently you are not, between lands that have gravel --

MR. MANZ: No. I am sticking with the question. He testified that people have come up and offered to sell gravel lands that he is aware of and I want to know whether it was a few times or many times or how many times and when they were made, if he will tell me.

THE WITNESS: I can't tell you when there may have

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been some that came up. That is not uncommon.

MR. MANZ: All right.

THE WITNESS: That doesn't mean they have got gravel on them, but they come in.

MR. MANZ: All right. You got your point across, Mr. Weiss.

MR. WEISS: Well, that is true.

MR. MANZ: But that is, you know, that is improper. Whenever we reach a key point you interject and start testifying. I want to object to that on the record.

MR. WEISS: Everyone is trying to sell land. They might think that there is oil on it.

BY MR. MANZ:

Q. Do you know from your own knowledge whether or not your father, or any companies that he was associated with, ever actually tested for gravel, sand or grit on lands that were not purchased by him or these companies?

A. If you are asking did we ever go out and test for gravel land on different pieces, yes, we did.

Q. And did you ever test any lands that contained

gravel, grit and sand that you did not purchase, lease, or take an option on?

A. We have found some, very small quantities, on different pieces of property that weren't commercially worthwhile considering. I could point that out to you.

Q. Were there any pieces that were commercial that you didn't purchase after testing?

A. Yes, there was one.

Q. Would you tell me the name of that, where it was located?

A. Sardinia.

Q. Okay. How do you identify that piece of property? What do you call it?

A. Well, probably to save you time, it would be one that Aurora Contractors got their gravel of of.

Q. What year was that?

A. I couldn't tell you now.

Q. Was it a long time ago, or was it in the last ten years?

A. Within -- I think it was -- we had negotiated for that, or had tested that longer than ten

* * *

MR. MANZ: Any other lands.

MR. WEISS: No, No. 7.

MR. MANZ: Any copies of documents involving the Tonawanda Indian Reservation, possible options to lease.

THE WITNESS: I can remember some of these. There were some in East Aurora. I can't remember there even being any book work involved in them. Some of them we had done with no book work whatsoever. We merely went in and, the East Aurora Section is a dead issue. There is a lot of gravel over there and it isn't worth the powder to blow it to heck.

BY MR. MANZ:

Q. And over the years, have you always used one company to do your testing?

A. No, no particular pattern. Most generally my father would take it personally. He would usually, if he wrote up an option, he usually wrote it up for himself.

Q. All right. Were there any lands that did contain gravel, grit or sand that you or your father,

or any of the companie refused to purchase because of the price?

A. That had gravel on it?

Q. Yes.

A. Well, if you are not going back to stuff that him and the Pfohl boys used to work at, I couldn't even keep up with them, them guys, myself at that time, between them and my father and some more, they were trying to nail everything down. I don't know what the heck they did. I couldn't even keep up with them.

Q. Since May of 1949, do you recall any specific properties that you refused to purchase because of the price?

A. No. I don't recollect any. There could be some, though.

Q. Does the name "Reno" mean anything to you?

A. Yes.

Q. Was that his correct name, Mr. -- or the fellow they call "Reno"?

A. I am going to guess and I believe it was "Reno Rodrico".

Q. Did your father used to do business with him?

A. He went around and secured properties that -- Shurr, that was the road I couldn't think of before, "Shurr Road", between the Thruway and --

MRS. MUCK: That doesn't pertain to this question. This one is the Indian Reservation.

THE WITNESS: Yes, he done that too. This man used to go and try to get options on gravel lands and offered to sell it to people who needed the sand, grit and gravel; right. Well, I had very little connection with him. I just remember the name. I do know that he secured them options on Shurr Road and my sister brought up that he had some participation in that Indian Reservation. That is all I can tell you. I don't know much about the man.

BY MR. MANZ:

Q. What about the Shurr Road property, this is the road you say these other lands are involved in, the Zola and the other names?

A. Yes. They are all along that -- all front on that road.

Q. Yes. Do you have any records in your files that indicate the commercial value of the gravel, grit and sand on these pieces of property that you mentioned off of Shurr Road and the Thruway?

A. There is no gravel on them whatsoever that I know of.

Q. Okay. The question I asked you is, do you have any records?

A. No. Nothing has ever been done there. You are welcome to walk it, you can see there is outcroppings of stone.

Q. That is strictly stone?

A. That is right.

MR. MANZ: All right. Off the record.

(DISCUSSION OFF THE RECORD).

(Whereupon, the proceeding in the above entitled matter was recessed until 2:00 p.m.).

* * *

BY MR. MANZ:

Q. Do you want to tell me about that?

A. Yes. There was one chunk that was on the corner of Peters Corners Road.

Q. What about this piece? Do you own it, or did you try to buy it?

A. No. We own it.

Q. You own it? Oh, I see. All right. This was on that list?

A. No. There was one, too, I can brief you, that was what we called the "Reno", the Reno Rodrico the fellow they called Reno, he had bought it and --

Q. Peters --

A. Located on Peters Corners Road, and I think it was I, my mother and Lois owned that piece. We had it a couple of years and then when Pine Hill had bought it, the whole deal, that transaction took place, it was a while afterwards we decided to, you know, there wasn't enough in consideration or wouldn't be enough material there to ever set up a washing plant and we tried to sell it, and I went over and talked to

Bob Jones and told him about it, and I asked him if he had any interest in it and he said he would talk to Kahle and that must have been -- it went two or three weeks that I stopped and talked to Bob Jones again and Bob Jones, he is the Pit Superintendent, I believe. I believe that was his proper title --

Q. Well, what happened?

A. Well, anyhow, Bob Jone, whatever he was, said, "We have no interest in it".

Q. No interest in it?

A. No.

Q. What did you do with the property?

A. We sold it then to Clarence Sand & Gravel.

Q. Okay. Do you recall, roughly, the year?

A. No, I can't.

Q. But this was after 1949, was it not?

A. It was after, oh, yes, it would have been after Pine Hill had bought out Pfohl.

Q. All right.

A. It was a time after that too, and I am not even sure when.

Q. All right. So this was one piece of property

that Reno had apparently negotiated. Now, Mr. Frey, what other pieces of property have come to mind now that Reno negotiated for you and actually you or members of your family purchased?

A. Gee, I can't think of anymore, Mr. Manz.

Q. But there were some, but they don't come to your mind; is that it?

A. I don't know if there was any more. There was one piece, we had an option on it, this I remember, and that was over on -- you people got it now, Pine Hill has it. It is behind the County Line Stone and we had an option on that piece but I don't know, we never pressed the deal. I guess, technically, we probably still have the option on it, but you people wound up with it and I guess own it. There is not a lot of gravel in it. It had gravel on down to the stone.

Q. I see. Do you remember the approximate date of this?

A. No. After County Line Stone was operating though.

Q. I see. How long have they been in business?

A. Gee, that must be -- I will guess, maybe around

eight or nine years now; am I right on that guess, I don't know for sure.

Q. All right. Can you think of any other pieces?

A. No.

Q. Now, this morning you talked about properties that you tested but didn't have the commercial use that you required. Could you, as a professional expert in the field, tell me what you mean by, "commercial use"? How would you decide what is satisfactory and what is not satisfactory? Is it the quality, the amount --

MR. WEISS: Do you mean in respect to any type of standard or contract?

MR. MANZ: I will rephrase the question.

BY MR. MANZ:

Q. Mr. Frey, this morning you said that you refused to buy certain lands because they didn't have commercial use. What did you mean by that?

A. Commercial value for sand and gravel?

Q. Right.

A. Well, I think any piece of property that wouldn't have any volume on it for one thing would alleviate that from commercial value; that it might

be far more practical to leave it in farmland or whatever it was now going.

Another one would be if the material obviously lacked any quality that would even conform to A.S.T.M. standards and there is a code of ethics in the gravel industry that we have to conform to for quality and the A.S.T.M. has been established and if you can't get a piece that you feel is going to qualify for the A.S.T.M. standards you might as well reject it.

Q. So as I understand it, you had the opportunity or your companies, or your father had the opportunity to buy certain pieces of land, but you felt there wasn't enough volume or it did not stand up to a certain standard; is that correct?

A. Yes.

Q. Okay. How many pieces of land would you say that you or your father or your company have had the opportunity to purchase since May of 1949 to the present time where there was gravel, sand and grit present, but not of the proper or adequate volume that you determined was necessary?

MR. WEISS: You said not of the proper or adquate volume?

MR. MANZ: Yes.

MR. WEISS: Are you including the quality in there too?

MR. MANZ: Just volume.

MR. WEISS: Just volume. You said not of the proper -- I thought you were going to say "quality", so you left me hanging.

THE WITNESS: I truthfully can't answer you. I have seen them come in two or three times a year, and I have seen also a year go by that nobody would come in with a proposition; there is no definite pattern to it, Mr. Manz.

BY MR. MANZ:

Q. All right. Just so that I understand it, I am not the expert, you have had the chance to purchase land that had the quality but did not have the volume, so you determined not to buy it; is that correct?

A. Would you repeat t at again?

(Whereupon, the pending question was

read back by the reporter).

THE WITNESS: To get technical, the way you phrased the question, some had the quality but didn't have the volume. Usually if they didn't have the volume, you never checked, bothered checking the quality that was there.

BY MR. MANZ:

Q. I see.

A. If that will help you.

Q. What I have in mind, Mr. Frey, what is the amount necessary to make it commercially valuable as far as volume is concerned?

MR. WEISS: Now, I don't think that is a clear question unless you relate it to some more -- there are too many variables in that.

MR. MANZ: There is only one variable. I want to know how many acres, or what is the volume that he feels makes it qualify for commercial value.

MR. WEISS: Is this material?

MR. MANZ: I think so.

MR. WEISS: Do you understand the question, Mr. Frey?

THE WITNESS: Yes.

MR. WEISS: And you are assuming high quality?

MR. MANZ: Assuming, yes, that there was quality, proper quality, adequate quality.

THE WITNESS: Well, I would probably have to come back with the next question, which is the location.

BY MR. MANZ:

Q. In Erie County?

A. Well, if it is downtown Buffalo here, I don't think it is worth too much. You probably couldn't get a permit. It just depends. I don't know. There is an awful lot of variables involved there, Mr. Manz. I couldn't answer that question. If you want to pick the spot and location, that would be better.

Q. All right, sure.

A. I am not trying to be facetious. I don't know how to answer you.

Q. I understand. All right. Now, assuming there was a piece of property available at the corner

of a road, say in Erie County, in the Town of Elma, and you wanted to buy it for reserve for gravel, grit and sand, and there was a reasonable chance of you getting a permit and the quality was adequate for your purposes, how large a farm would be required by you, or what would be the deposits present on this farm that would make it commercially valuable to you?

MR. WEISS: I will object to that on the grounds it is highly hypothetical. I am not addressing myself at the present time to the form of the question which is also objectionable, but I am just addressing myself to the substance of the question and I find it objectionable and I instruct the witness not to answer. It is purely hypothetical.

MR. MANZ: All right. So you are instructing him not to answer the question?

MR. WEISS: Yes.

BY MR. MANZ:

Q. Now, the farms that you do own out in Genesee County, could you tell me the acreage of these farms? * * *

A. It is a ravine, actually a revine.

Q. All right. Do you have any land in Genesee County that has gravel, grit and sand on it?

A. Not offhand, I don't think.

Q. So the only gravel, sand or grit that you bring in from Genesee County is in the Alexander Area, which would be what you leased from the farmers; is that correct?

A. Fundamentally, what we lease from the farmers as far as I know.

Q. Okay. All right. This morning I meant to ask you, in what County does Material Services, Inc. operate?

A. At Alexander.

Q. Any other Counties?

A. No.

Q. All right. I also neglected to ask you this morning about whether or not you have any leases or own any land, or have any rights or interests of any kind, on any lands that have grit, sand and gravel in Allegany County?

A. No.

Q. All right. In regard to the Sardinia Property,

I neglected to ask you why you purchased that property?

A. Fundamentally, the material there would qualify for bank run and it has a substance there that we don't feel we could get out to make a good commercial A.S.T.M. sand, grit and gravel. We just don't feel the quality is good enough to accomplish this mission. It has bank run in it. We call it "bank run". I see the State did accept it when the Aurora Expressway went through.

Q. All right. Now, do you have any personal knowledge of any lands in Erie County that are available to be purchased that contain gravel, grit and sand, that could be used in your business?

MR. WEISS: Objection to that. That is hypothetical unless you are asking if any lands are currently being offered to him for purchase with fixed terms which he could merely say -- I expect you to say that the hypothetical questions, what lands are available. Any land is available for a price. You can buy the City of

Buffalo for the right price. So I object to that question and I instruct him not to answer. I don't object to anything specific.

MR. MANZ: All right. I think the question is proper and I am not concurring in his objection, but in view of the fact that he is instructing his client not to answer, I am not going to pursue it at this time. We will leave it there for the Judge to decide.

BY MR. MANZ:

Q. All right. Now, Mr. Frey, from your own knowledge, is there land available in Erie County that is commercially valuable, if the proper terms could be negotiated, could be purchased or are suitable for obtaining aggregate for ready-mix?

MR. WEISS: The same objection, unless you ask him does he know of any lands that have been offered to him, of his own knowledge. You are asking him to speculate. I think that is -- how can he speculate,

Vic, on what might be available. You can ask him what effort -- I would not object as to what effort he made to locate any.

MR. MANZ: All right. Again, I am not going to pursue it. Just so we don't get into an argument, I think the question is proper.

MR. WEISS: I would ask you to rephrase the question.

BY MR. MANZ:

Q. I will now ask you whether or not, just a general question, you are an expert, whether or not there are other areas, whether they are for sale or not?

MR. WEISS: That have gravel on them?

MR. MANZ: That have gravel, sand and grit, in Erie County.

THE WITNESS: Do you mean that would be A.S.T.M. approved, Mr. Manz?

BY MR. MANZ:

Q. You keep talking about A.S.T.M. but commercially useable or valuable --

MR. WEISS: If you think A.S.T.M. is part of the commercially valuable, you can put that in. If you do not --

MR. MANZ: I will object, Mr. Weiss. Again, you are testifying. Every time we come to a crucial question, Mr. Weiss interjects and testifies and I am going to object to that, and I am going to -- if you insist, we will leave and go to see the Judge and straighten this out once and for all. I strenuously object to it. Let him answer the question, or just object to it.

MR. WEISS: He asked for clarification and I am trying to give it to him. I told him that if he feels that should be in there, that it should be, and if he thinks that it should not be in there -- you said he keeps referring to A.S.T.M. Now, if you ask him and I won't object to this, "eliminating A.S.T.M." so long as there is no confusion here, then --

MR. MANZ: There is no confusion.

MR. WEISS: I don't want any confusion.

MR. MANZ: I don't think he is.

MR. WEISS: As long as it is clear.

BY MR. MANZ:

Q. All right. Now, let me start all over again. What is A.S.T.M.?

A. I believe it is the "American Society -- do you know what the last two words are?

Q. No. Wait. You are on the stand. Nobody can help you, not even Mr. Weiss.

A. Okay. All right.

MR. WEISS: Let the record show that Mr. Weiss is not trying to help him. He is just trying to get a clear record.

THE WITNESS: It is a universally accepted standard that seems to be acceptable around the world as a criteria determining what is good and acceptable sand and grit and gravel.

BY MR. MANZ:

Q. Okay.

A. Also crushed stone and many other products.

Q. Did you ever mine and use any gravel, grit and

sand that did not conform to A.S.T.M.?

A. Not knowingly, no.

Q. And how long has this A.S.T.M. been in existence or use?

A. I couldn't even tell you.

Q. A short period of time, or --

A. Well, it has been quite a long time.

Q. Okay. Do you produce A.S.T.M. material at Alexander?

A. Yes.

Q. And is that the only type of material that you produce there?

A. Well, we have produced for the State, but they didn't require -- they required at least A.S.T.M. quality, but they didn't require A.S.T.M. gradations and I believe now they are pretty much in accordance with A.S.T.M. standards on gradation.

Q. What about as to hardness?

A. That is usually considered in the A.S.T.M. Specs.

Q. I see. Okay. I will ask you the question again: from your own knowledge, are you aware of any lands, whether they are for sale or not,

in the County of Erie, that are suitable for the mining of gravel, sand and grit by A.S.T.M. standards?

MR. WEISS: Now, I object to that unless you will state whether or not you are talking of -- you have injected a word and I don't care if you put it in or leave it out, "commercially feasible", or not.

In other words, are you saying, "commercially feasible", or not?

MR. MANZ: Commercially feasible.

MR. WEISS: Would you read the question again with those words in it, please?

MR. MANZ: All right.

BY MR. MANZ:

Q Do you know, from your own knowledge, whether or not there are any lands --

MR. WEISS: Whether or not they are for sale?

MR. MANZ: -- in the County of Erie, and I am talking about farmlands, that are commercially valuable or usable, that conform to A.S.T.M. Standards?

MR. WEISS: And you say whether or not they are for sale?

MR. MANZ: No. Just whether there are any lands. That is the next question.

MR. WEISS: Well, are these lands for sale, or not for sale, or doesn't it matter to you in this question?

MR. MANZ: Not in this question.

MR. WEISS: Okay. Do you understand the question?

THE WITNESS: Yes.

BY MR. MANZ:

Q. Do you know -- can you tell me where they are located?

A. I could.

Q. Will you?

A. No.

Q. Why not?

A. Well, someday there may be a reason that I just may want to get them myself.

Q. All right. Have you or any members of your family at any time since 1949 to the present time, determined and investigated to see whether or not they were available for sale?

A. No -- wait a minute, what year?

Q. Since 1949 to the present time?

A. I haven't investigated; no.
Q. Nor any member of your family?
A. No
Q. Do you know whether or not your father did?
A. I think he did.
MR. WEISS: He was a member of the family.
THE WITNESS: No, I think he had; yes.
BY MR. MANZ:
Q. Prior to his death?
A. Oh, yes.
Q. How shortly?
A. A long time ago, many many years ago. I am not sure of the dates, Mr. Manz. I can't answer that, it is so far back.
Q. So far as you know, are these lands still available for purchase?
A. I am not sure they are for purchase.
MR. WEISS: There is no evidence that they were ever available for purchase.
THE WITNESS: Or even for sale. That should be injected; that is right.
MR. WEISS: I gave you an example of how bad your question is, Vic. Your own lands, Pine

Hill lands --

MR. MANZ: Just a moment. I will object to this. What do you want to do? Do you want to go to the Judge and get some rules now? Are you going to testify. Look, don't tell me what to ask. If you think it is objectionable, object to it.

MR. WEISS: I am trying to help you.

MR. MANZ: And if you bring in personalities or get personal again, I will be right before the Judge with you.

MR. WEISS: This is not personalities.

MR. MANZ: Then we can settle it once and for all because I am not taking anything from you anymore.

MR. WEISS: Vic --

MR. MANZ: I mean it.

MR. WEISS: I would like to put this on the record: you asked the question, included lands that are presently mined for --

MR. MANZ: Just a moment. What are you testifying to now. You have no right to testify or give information to your client.

MR. WEISS: You ask defective questions.

MR. MANZ: That is what you think.

MR. WEISS: No, I know it.

MR. MANZ: That is what you think.

MR. WEISS: I have not objected to any question you have asked, if you ask proper questions that are clear, and you don't confuse the record or confuse the witness. I have no objection then. If you will state all of the valuables in your questions I will never have an objection. Now, the question you asked, the lands that Kahle owns now that are mining would be included as an answer to where lands are that have gravel.

MR. MANZ: I will object. Now, he is testifying again. You are going to state your objection or we are going to get a ruling on that, Arnold. I don't want your testimony for your client anymore.

MR. WEISS: Your question is not designed to elicit any relevant information.

MR. MANZ: They certainly are.

BY MR. MANZ:

Q. The question I want to ask you, Mr. Frey, is whether or not you know from your own knowledge -- well, strike that.

The question I will ask you at this time is: whether or not you know whether there are any lands for sal --

MR. WEISS: At the present time?

BY MR. MANZ:

Q. -- that have the quality that you determine would make them commercially valuable?

MR. WEISS: This is at the present time?

MR. MANZ: At the present time.

THE WITNESS: You are excluding those that are owned by Pine Hill, Clarence --

MR. MANZ: I said, "for sale".

MR. WEISS: Well, yours are not for sale.

THE WITNESS: Including Clarence?

MR. MANZ: Anybody's that are for sale. You take your choice?

MR. WEISS: Is that in Erie County?

MR. MANZ: Erie County.

THE WITNESS: Well, farmland that is owned by people not in the business, yes, there is one piece that I know of, yes.

BY MR. MANZ:

Q. And have you negotiated?

A. Now, wait a minute. I don't know whether it is for sale any more. I don't know if it is going to be for sale.

Q. All right. When was it for sale that you are aware of?

A. Well, I was a young kid, as I remember, that was a long time ago.

MR. WEISS: If you ask the next question, I am going to direct him not to answer.

MR. MANZ: Okay. I won't ask that question.

THE WITNESS: I can't date it for you. I just can't tell you.

BY MR. MANZ:

Q. In the last four years, are you aware of any lands that were for sale?

A. No, sir.

Q. Okay. All right. Now, at the present time and since February 6, 1968, where have you been ob-

taining your aggregate, that is, gravel, grit and sand, to be used in your ready-mixed business?

A. Pine Hill and -- all plants you are referring to or just the Lancaster Plant?

A. Any Plant.

MR. WEISS: Can we give it plant by plant.

MR. MANZ: He can explain it any way he wants.

MR. WEISS: Give him one plant at a time because there is some confusion.

MR. MANZ: He is not confused. Just answer the question, Mr. Frey.

MR. WEISS: I don't want the record to be confused.

MR. MANZ: Well then be quiet and it won't be confused.

THE WITNESS: Sand and gravel in our West Seneca Plant comes from Dan Gernatt.

BY MR. MANZ:

Q. Is that Franklinville?

A. No. Dan Gernatt is in Gowanda and Machias, which is a division of General Crushed Stone, and Franklinville Stone & Gravel, which is a Division of Koppers Corporation, or used to be

the Buffalo Slag Corporation; and Lancaster, we got from Pine Hill. We have got some from ourselves and we get an awful lot from Dan Gernatt and we are getting some from Machias.

Q. All right. Okay. Now, in regard to the purchases from Dan Gernatt, when did you start buying from him?

MR. WEISS: At which Plant?

MR. MANZ: From any plant.

MR. WEISS: The first plant you started buying from Dan Gernatt.

THE WITNESS: Well that is our West Seneca Plant, we bought from all these people except Pine Hill.

BY MR. MANZ:

Q. Okay. And from the very beginning?

A. Yes. I am sorry -- you are referring to Dan Gernatt. So we had started with Franklinville Sand and Gravel at West Seneca.

Q. How long ago was that?

A. Ever since that plant has been open. I am not sure how many years, but it must be at least twelve or more years.

Q. Okay. When did you first buy from Machias and for which plant?

A. The same plant, the West Seneca Plant. Pardon?

Q. I didn't say anything. When did you start buying there?

A. Well, I couldn't definitely answer that question. I am not sure.

Q. More than ten years?

A. Oh, it is possible. I am not sure.

Q. How about Lancaster Sand & Gravel, for how many years have you been purchasing from them, and for what plants or plant?

A. You mean at the Lancaster Plant?

MR. WEISS: Yes. I didn't hear you mention Lancaster Sand and Gravel -- he didn't mention that.

BY MR. MANZ:

Q. Excuse me. I thought you said "Lancaster Sand and Gravel". Have you been buying anything from them?

A. Who is Lancaster Sand and Gravel?

Q. Well, I must have made one up.

A. That is a new one.

Q. And the answer to the question is, "no". All right. We are talking about the Lancaster Plant?

A. Okay.

MR. WEISS: What is the question now?

THE WITNESS: What do you want to know, Mr. Manz?

BY MR. MANZ:

Q. Okay. Now, you have been buying from yourself, that is, Frey Sand & Gravel, that you are talking about?

A. Yes.

Q. Okay. And have you been buying from yourself foruse in both Plants?

A. We have used some stone in the West Seneca Plant from ourselves, or from Frey Sand & Gravel. We used a little grit here at Lancaster from ourselves; concrete grit.

Since the Court Order, we have used mostly Dan Gernatt's material.

Q. Is that all A.ST.M. material?

A. Yes.

Q. Could you tell me what other sources of supply for sand and gravel there are in Erie County?

A. Oh, I am not sure. I don't think Gernatt is even in the County of Erie. I don't think Franklinville or Machias are in the County of Erie, and DeWitt, I don't believe is in the County of Erie. I don't know how you would rate the lake sand. They put in locally in the Buffalo Area at various docks. Would you consider them the County of Erie or what would you consider them? I think Pine Hill with their predatory actions obviously --

MR. MANZ: Well, I will object to that.

MR. WEISS: Let him finish his answer.

MR. MANZ: No. I have objected. I don't want him to finish that.

MR. WEISS: Well, we arenot going to let him continue. I will not permit this deposition to go on.

MR. MANZ: That is certainly self-serving and everything else.

MR. WEISS: When he can finish the answer the deposition will go on.

MR. MANZ: The question I asked you, is it responsive?

MR. WEISS: That is responsive. Read back the answer.

MR. MANZ: Well, the question I asked him, I said, what were the other sources of supply in Erie County.

MR. WEISS: And he was answering you.

MR. MANZ: Yes.

MR. WEISS: When he can finish his answer the deposition will continue.

THE WITNESS: Fundamentally, they have the rest of the gravel deposits in the County of Erie.

MR. WEISS: Who is that?

THE WITNESS: Pine Hill.

BY MR. MANZ:

Q. All right. So you have Pine Hill. Okay. What about Clarence Sand and Gravel?

A. I don't think you will find that they have got very much, if any left to speak of because they are buying from Mr. DeWitt.

Q. I see. And DeWitt, what is the correct name of that corporation? Is that DeWitt Sand & Gravel, or what?

A. I don't really know just how it is worded.
Q. Where are they located?
A. In Batavia. He has another place down in the north some place. I understand they bring in some stone from down there. I am not sure of the community at all.
Q. When you have referred to "Lakeside", is that the Erie Sand & Gravel Company?
A. Yes.
Q. And you do buy from them?
A. No.
Q. They do have gravel and sand available for sale?
A. Yes.
Q. How about Western New York Sand & Gravel?
A. I believe that is Penepent in Batavia.
Q. Did you ever buy from them?
A. No. We are selling to them right now.
MR. WEISS: Now, are you asking if this was in Erie County, or are we going in other areas? Let's make it clear. Now, your question was "other sources other than in Erie County"?
MR. MANZ: He is answering --

MR. WEISS: The record is not clear and I insist on a clear record. Now, I think --

BY MR. MANZ:

Q. Other than Erie County, what other sources are there that are available to sell sand and gravel?

A. Well, actually, to get technical, Mr. Manz, in the County of Erie there isn't any except Pine Hill that I know of.

Q. All right. The question --

A. I think all these other ones I mentioned are out of Erie County. The one that would come close would be Erie Sand & Gravel.

Q. All right. Have you ever bought any sand and gravel from Olean Sand & Gravel?

A. No.

Q. How about Elmira?

A. Yes.

Q. For which plant, West Seneca?

A. Both.

Q. Are you still buying from them?

A. Yes.

Q. What do you buy from them?

A. Concrete grit and stone.

Q. All right. Now --

MR. WEISS: Wait a second. Do you buy grit and stone for both plants from them?

THE WITNESS: We have, for both. We have bought for West Seneca, we bought stone from them.

BY MR. MANZ:

Q. Is that delivered to you or do you pick it up at their plant or the pits, I should say?

A. Most -- in all cases, we, of all these far away places, our truckers pick it up for us.

Q. All right. But from any of our sources other than Pine Hill, do they deliver to your yards?

A. None of them.

Q. Are there any other companies that I haven't mentioned that you buy sand and/or gravel from?

A. Other than real odd-ball specialty items that we have had to get in out of state, and things of that type; no.

Q. Now, in connection with your operation in Genesee County, Alexander, as I understand it, you have your own washing plant there?

A. That is right.

Q. Okay. And then you truck it into Buffalo to --

or to your plant at West Seneca or to Lancaster I should say?

A. If we use it ourselves; yes.

Q. Okay. Do you have adequate supplies in Genesee County to supply all your needs?

MR. WEISS: Objection to the question unless you define what you mean by "adequate". It is an ambiguous question and "adequate" means what; adequate for a year, a day or for a long haul, or adequate in the case of production or reserves?

MR. MANZ: All right.

BY MR. MANZ:

Q. What are your reserves in Genesee County?

A. I believe the State of New York lists them as substantial.

Q. What does that mean from a technical point of view?

MR. WEISS: If you know.

THE WITNESS: I would have to judge it would determind how rapidly and how fast you sold and how fast you processed the material; how long it would last.

BY MR. MANZ:

Q. All right. Based upon what your use was in the year 1972, could you answer the question?

A. No.

Q. Well, how much sand, grit and gravel did you use in both of your plants in the year 1972?

A. I couldn't answer you because I don't know right now, but I can find out for you.

Q. Do you have an estimate at all based upon, say, the average use that you have had over the last five years as to the number of years of supply that you have in the deposits that you have under lease or under option in Genesee County?

A. No.

Q. Can you give me an estimate?

A. No.

Q. Do you have a record of the deposits?

MR. WEISS: A record of deposits or use, or what?

MR. MANZ: Deposits.

MR. WEISS: How can you have a record of deposits?

THE WITNESS: No, I don't.

BY MR. MANZ:

Q. Do you have any estimate or evaluations made of

the lands out in Genesee County?

A. No. We know where it is. We don't have the volumes that are there; no.

Q. Do you have any estimates at all of it?

A. No, we don't.

Q. Now, you say the State has determined that they are substantial?

A. That is just what they say. I don't know how they determine that.

Q. You don't know how they arrived at that?

A. No, I do not.

Q. Assuming you stopped buying from all other suppliers; how many years would you estimate that your company could exist from the supplies that you have in reserve and on hand in Genesee County?

MR. WEISS: You mean financially, economically, or as a quantative matter regardless of price and their discriminatory actions?

MR. MANZ: Well, I will object to that, Mr. Weiss.

MR. WEISS: You mean quality --

MR. MANZ: If you do that again, we are going to terminate this, and we are going to go

before the Judge, and if you are not going to stop with your antics, Mr. Weiss, any time you want to stop with your antics, they are not as subtle as you think they are.

MR. WEISS: When you said, "how long can you exist", that is a tricky question.

MR. MANZ: There is nothing tricky about it.

MR. WEISS: Well then, rephrase it, if it is not tricky.

BY MR. MANZ:

Q. Assuming you didn't buy from Pine Hill, and you didn't want to buy from anybody else, how long could your company exist, based upon the amount of sand and gravel you use now?

MR. WEISS: Let me ask you, based upon the reserves, the usage at your West Seneca Plant and the Lancaster Plant for sand, grit and gravel last year, how many years supply would the Genesee County Plant have; if you know? That is what he is trying to ask you.

THE WITNESS: I couldn't answer that.

MR. WEISS: All right.

THE WITNESS: I just don't know.

BY MR. MANZ:

Q. You have no knowledge?

A. No, I do not.

Q. And you don't have any records?

A. None.

Q. Or anything in your office that would determine the amount of sand, grit and gravel that is available for you to mine and --

A. No, I don't.

Q. -- and to produce?

A. No. There is no yardage that has ever been taken or estimated.

Q. Well, how many acres do you have under lease?

A. I couldn't even tell you. I can tell you by farm, but I can't even tell you the acreages in each farm.

Q. How many farms?

A. It must be at least four or five of them out there that we have under lease.

Q. Are all your leases recorded out in the Genesee County Clerk's Office?

* * *

A. Well, I could run through all the terms of the contract at the time.

Q. What are you familiar with right now?

MR. WEISS: Well, so long as it is understood that the contract does speak for itself and that his recollection does not control as against the contract --

THE WITNESS: I don't know how far you want to go on that phase.

BY MR. MANZ:

Q. All right. Basically --

A. That is an awfully broad question.

Q. All right. Basically, these are the terms you remember; is that it?

A. There was a lot more terms, sure, but it didn't involve us having to keep a highlift operator up there on top and servicing the plant for that intermittent delivery.

Q. All right. Now, from what you have told me, I just want to make sure that I understand you. As you explained it, prices charged you by Pine Hill or Regent Sand & Gravel never deviated or changed from 1957 until the year 1968?

MR. WEISS: I will object to the question unless you break it down between the two companies.

MR. MANZ: Can you answer that?

MR. WEISS: I Object to the question unless you break it down.

MR. MANZ: Are you ordering him not to answer?

MR. WEISS: No. I am just objecting to the form of the question unless he states -- in fact, I will ask him to state it for each company unless you want to confuse it and I don't think you want to do that.

MR. MANZ: No. You are confusing it. He understands the question.

THE WITNESS: Would you repeat the question again?

(Whereupon, the pending question was read back by the reporter).

MR. WEISS: Could you break that down. Give each answer separately, please?

THE WITNESS: I couldn't answer it only in respect to our billing. Let's put it this way; what we usually receive from Pine Hill didn't change.

BY MR. MANZ:

Q. All right. Now, from August of 1957 to February of 1968, the billings you did receive, you received from Pine Hill?

A. I believe that is correct.

Q. All right. And the cost basis again was this price list that didn't change for over ten years; is that correct?

A. I can't just remember how the price was arrived at back at that time.

Q. All right. It never varied in the ten years, that basis?

A. No, there was no changes made that I know of.

MR. WEISS: Vic, we have been going for an hour and a half. Can we take a few minutes break?

MR. MANZ: Surely.

(Whereupon, a brief recess was taken at this point).

BY MR. MANZ:

Q. Now, Mr. Frey, presently, do you buy all your cement from one source?

A. No.

* * *

A. Yes.

Q. Okay. Prior to the cessation of the delivery, did you receive notices from Pine Hill to pay a certain bill for a claim that they allegedly had where you were indebted to them in the sum of approximately $40,000.00?

MR. WEISS: Do you have this bill or notice?

MR. MANZ: No, I don't have it.

MR. WEISS: I think you mis-spoke as to the date.

MR. MANZ: Well, I am asking him if he remembers.

MR. WEISS: Well, I think -- why confuse the record. If you did mis-speak, the bill will show this.

BY MR. MANZ:

Q. Do you remember receiving a bill from Pine Hill prior to the cessation of deliveries?

A. Disregarding the date, yes, there was a bill.

Q. Okay. All right. And do you recall receiving any letters just prior to the cessation of the deliveries in which Pine Hill stated that, "if you didn't pay this bill, this outstanding bill, that deliveries would stop"?

A. I believe that is correct.

Q. Thank you. Well, you have a file on this, do you not, in your office?
A. I think we do.
Q. You have copies of all these letters?
A. Yes.
MR. WEISS: He doesn't have the one -- I don't know if he has the records to supply that.
THE WITNESS: Yes, at the office, yes.
BY MR. MANZ:
Q. Okay. Now, you certainly have looked over this file prior to coming here, haven't you?
A. Yes.
Q. Okay. So that I mean, you are familiar with the fact that letters were sent to you?
A. Yes.
Q. Okay. Now, you refused to pay this bill; is that correct?
A. Yes.
Q. All right. Would you, in your own words, tell us why you refused to pay this bill?
MR. WEISS: Could you show him the bill, please?
MR. MANZ: I don't have it.
THE WITNESS: The bill we are talking about is the

one that ultimately led to you people not supplying.

BY MR. MANZ:

Q. Correct.

A. Would you phrase the question again?

(Whereupon, the question referred to was read back by the reporter).

MR. MANZ: Well, Mr. Weiss, I am going to object. Mr. Frey keeps writing himself notes there, I presume, and --

MR. WEISS: Pardon me?

MR. MANZ: I say Mr. Frey is writing notes to himself.

MR. WEISS: Not to me.

MR. MANZ: And I don't think that is proper. He is not going to be able to do that in Court and I don't think he should do it here.

MR. WEISS: What are you doing, Mr. Frey? Are you making notes for your answers?

THE WITNESS: I have the list of different things he wants to know and I am trying to figure out why we refused to pay the bill and

* * *

MR. WEISS: I object to your taking advantage of the witness and saying that he testified to that.

MR. MANZ: My taking advantage of a six foot six, 250 pound man?

MR. WEISS: But he can't make faces like you do.

BY MR. MANZ:

Q. The question I asked you, Mr. Frey, is whether or not the price list that you just mentioned, whatever, apparently in 1967, that was sent to you, was the price contained in the prices you objected to which prompted you to not pay the bill?

MR. WEISS: I will object to that question and instruct the witness not to answer. He never testified that it was in September in 1967. Again, you are taking advantage of the witness.

MR. MANZ: Do you know what the price list says? Do you, sir?

MR. WEISS: I don't know what it says. Why don't you get the price list out?

MR. MANZ: Just let me try the case my way.

BY MR. MANZ:

Q. When did you receive the price list?

A. I don't know.

Q. You said before, sometime in 1967 for 1968, did you not?

A. I believe that is correct. I am not sure.

Q. All right. But the price list that you said you received in 1967, is that the price list that you objected to?

A. I am sorry. It couldn't have been shipped. I doubt if it was sent in 1967. Why don't we get the date that the price list was sent to us? I don't know when it was sent.

Q. Whenever it was sent, was the price list objected to?

MR. WEISS: I will object to the question and instruct him not to answer. That is indefinite and nebulous, "whenever it was sent". I asked you to show the witness the price list.

THE WITNESS: In the first place, I have no objection to any price list that you might put out.

BY MR. MANZ:

Q. Mr. Frey, there came a time when you refused to pay this $40,000.00 bill?
A. That is correct.
Q. Was that based upon the price in the latest price list that was sent to you?
A. Not altogether; no.
Q. What other reason did you refuse to pay?
A. I will have it for you.
Q. All right. I will withdraw the question. I think we should adjourn. It is twenty after 2:00.

MR. WEISS: Well, why don't you allow the witness to answer the question?

MR. MANZ: I will allow him to answer the question but not if it is going to take him a whole half hour.

MR. WEISS: Do you have the answer ready now?

THE WITNESS: No.

MR. WEISS: Okay.

BY MR. MANZ:

Q. I will rephrase the question. You said you didn't altogether object to the price, that price list?

MR. WEISS: That isn't what he testified to.
THE WITNESS: That isn't what I said.
MR. MANZ: What did you say?
THE WITNESS: I said that might have been one of the things.
BY MR. MANZ:
Q. I see. Can you give me one other item that you objected to?
A. I can give you quite a few.
Q. Give me one?
A. I am not ready yet. When I am ready, I will have it all ready for you, and I will give them to you.
Q. All right. I will withdraw the question. Now, prior to that time that we are talking about in February of 1968, did Pine Hill ever refuse to sell you any gravel, sand or grit from 1957 to February 6, 1968?
A. Other than in unusual circumstances, never, no.
Q. Okay. And these prices that we charged you were the prices that we charged everyone else?
A. Except that you got a special discount. This I am not sure of.

* * *

BY MR. MANZ:

Q. So if someone from Buffalo or Erie County wants to buy your product, you will sell it to him; is that right?

A. We never have anybody from Buffalo or Erie County in this end of it wanting to buy.

Q. Okay. Where do your customers come from?

A. Basically from Wyoming and Genesee Counties.

Q. Anybody else?

A. Not very many.

Q. I know there are not many. Just tell me -- just answer the question. Who do you sell to in Erie County?

A. Oh, we sell to a few people. We sell stone for leach fields, farmers and stuff like that.

Q. Do you sell it to anybody else in Erie County?

A. Any major customers, you mean?

Q. A customer, yes.

A. No, not too many.

Q. All right. Not too many, but tell me how many and to whom?

A. I could tell you a very small percentage ever comes in from Erie County.

Q. Do you ever sell to any competitors in the ready-mix business?

A. Many years ago we sold some to Bill Bender. Let's see, we sold to Amherst Ready-Mix.

Q. Are they still in business?

A. No.

Q. They just recently went out of business, didn't they?

A. Yes.

Q. And for how many years did you sell to them?

A. Well, normally he didn't buy from us. If he was short, if he was short on trucking, his trucker lived out in our area, he would bring a load in, usually one load in the morning, but that was only when he was behind trucking. He had one trucker that was from; I think, the man even lived in Alexander and that was about it, the only time he would buy. Normally he got from Pine Hill, I think, and he got some from Machias and I believe he got some from Gernatt.

Q. Okay. Now, other than the fact that there is no contract, as you allege, to buy from Pine Hill, are there any other reasons you didn't

buy any material like sand, grit or gravel for the West Seneca Plant?

A. From Pine Hill?

Q. Yes.

A. In what period, sir?

Q. From the period of 1957 to 1968?

A. Just in honoring the original Buffalo sand contract; no.

Q. I don't want to say you are evading the question; maybe I am not making it clear. I am not trying to be tricky. I am just asking you why you didn't buy material from Pine Hill to supply your West Seneca Plant?

A. Well, first of all -- another question, other than being a competitor, other than having a contract with Pfohl, there is an awful difference in price of what we have to pay at our West Seneca Plant and what we have to pay Pfohl. We could do a heck of a lot better from some of these other places than we could do through --

Q. Well, okay. What percentage of the amount of sand, gravel and grit that you processed at your Alexander Plant did you take and use in the West

Seneca Plant as compared to the total use?

A. Are you referring to, like last year for example?

Q. Let's say last year, yes?

A. Possibly a quarter.

Q. Would that percentage stand up for the other years also?

A. I would guess that would be approximately right.

Q. And then the other three-quarters would be purchased from the other sources that you mentioned?

A. Usually.

Q. Which you mentioned this morning?

A. Yes.

Q. Have you ever had any trouble supplying --

MR. WEISS: May I interject? Are you gentlemen talking about two different things? Are you both talking about the percentage of West Seneca?

MR. MANZ: Just a moment. I will object to Mr. Weiss' testifying and again he is doing at a very crucial time and I object to it. If you want to object to the ques-

ion, object.

MR. WEISS: I object to it. I don't understand it.

MR. MANZ: And I object to your testifying or telling your client anything.

MR. WEISS: Is the question --

MR. MANZ: He didn't say he didn't understand it.

MR. WEISS: I object to that. Okay. If everyone understands it, I don't, but okay. I will clarify it on cross-examination.

BY MR. MANZ:

Q. Mr. Frey, from 1957 to February of 1968 did you ever have any trouble supplying your West Seneca Plant with material used there, whether it was from your source of supply or anyone else?

A. I fail to follow you. How do you mean, "supply"?

Q. Well, you use gravel, grit and sand at West Seneca, do you not?

A. Yes.

Q. You said a quarter of it comes from Genesee County and your pits, is that right?

A. No, I didn't say it came from Genesee.

Q. Where does it come from?

A. Most of it comes from Dan Gernett.

Q. Did you say a quarter of it or 25% of it comes from Genesee?

A. I say maybe a total of a quarter; I am estimating, might come from our place to our West Seneca Plant in that period of time.

Q. All right.

A. There was one year, or a little over a year we didn't even operate.

Q. Okay. But nevertheless, during the years that you did operate, you never had any problems in getting sand, gravel or grit from any source to supply the West Seneca Plant; is that right?

A. No. Most of the people are quite pushy.

Q. In other words, they are after you to buy; is that right?

A. I am afraid so.

Q. Are there people that have been after you to buy, that you haven't mentioned here before?

A. There is one.

Q. What is his name?

A. I am not even sure what they call themselves.

Q. Well, what do you think they call themselves; where are they located?

* * *

A. They are in the area of Machias. It is a new outfit that has started.

Q. Are the prices right?

A. I never even discussed it with them.

Q. So in other words, price is not a problem as far as supplying your West Seneca Plant?

MR. WEISS: I will object to that question. That is a statement of fact, not a question. I instruct the witness not to answer.

MR. MANZ: I am not consenting. I am just going to stop and note my objection to his preventing his client from answering what I think are valid questions.

MR. WEISS: I will allow him to answer the question. If you will rephrase it, I will withdraw the objection.

BY MR. MANZ:

Q. All right. Do you know from your own knowledge whether or not there were any negotiations made with you or members of your family to settle this dispute with Pine Hill over this bill that you refused to pay?

A. I would say there were attempts by Pine Hill and

* * *

AFFIDAVIT OF SERVICE BY MAIL

#75-7698

RE: George C. Frey Ready-Mixed Concrete Inc. etc
vs
Pine Hill Concrete Mix Corp. et al

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 10th day of September, 1976 I mailed _____ copies of a printed Appendix in the above case, in a sealed, postpaid wrapper, to:

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10 Lafayette Square, Buffalo, New York 14203

Leslie R. Johnson

Sworn to before me this

10th day of September, 19 76

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77